Supreme Court, U.S.
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In The
Supreme Court of the United States

WOLPOFF & ABRAMSON, L.L.P.
and
UPTON, COHEN & SLAMOWITZ,
Petitioners,

v.

ARTHUR MILLER, on behalf of himself and all others similarly situated,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an attorney that has a genuine attorney-client relationship with a creditor must reveal to the debtor from whom the attorney is seeking collection of the debt privileged communications from the creditor client and the thought processes employed by the attorney in order to demonstrate that the attorney has complied with the Fair Debt Collection Practices Act?

2. Whether the decision in this case operates as a Federal regulation of the practice of law, a power reserved to the states under the Tenth Amendment?

3. Whether Federal Courts may impose higher standards on attorneys who are subject to the Fair Debt Collection Practices Act than those imposed on debt collectors who are not attorneys?

LISTING OF PARTIES

The Petitioners in this case are the law firms of Wolpoff & Abramson, L.L.P. and Upton, Cohen & Slamowitz. The Plaintiff below is Arthur Miller. Another Defendant below, the National Attorney Network, Successor to Wallace and de Mayo, a partnership and wholly-owned subsidiary of TSYS Total Debt Management, Inc., was dismissed from this case.

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OPINIONS BELOW

The District Court made an oral ruling from the bench (App. 42a-57a)[1] and there is no reported decision from that Court. The opinion of the Court of Appeals (1a-39a) is reported at 321 F.3d 292.

BASIS FOR JURISDICTION

The Court of Appeals' opinion was issued on February 25, 2003. A timely Petition for Rehearing *en banc* was denied on April 28, 2003. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

15 U.S.C. §1692e. False or misleading representations

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or

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1 All further references to the Appendix will be page number only.

any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of –

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to -

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized,

issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

15 U.S.C. §1692g. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing -

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

STATEMENT OF THE CASE

Arthur Miller owed a credit card debt to Lord & Taylor (L&T). L&T retained Wolpoff & Abramson, L.L.P. (W&A), a law firm that regularly represents L&T in various legal matters including debt collection, to collect Mr. Miller's overdue bill. W&A wrote Miller

three (3) letters demanding payment of the bill. Its third letter offered Miller a twenty percent (20%) discount in exchange for a prompt payment. Miller did not respond to W&A. W&A referred Miller's account to its New York co-counsel Upton, Cohen & Slamowitz (UC&S) for litigation. Upton, Cohen & Slamowitz commenced a lawsuit against Miller on behalf of L&T. Miller ultimately settled his L&T account for slightly less than W&A's pre-litigation settlement offer.

Miller filed suit against both law firms alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. §1692, et. seq. (FDCPA). Miller's complaint, pled on information and belief (54a-93a), asserted W&A and UC&S falsely represented themselves as attorneys in violation of 15 U.S.C. §1692e(3). Miller claimed that L&T actually referred the account for collection to a third party, the National Attorney Network (NAN), that NAN controlled the entire collection process, and that NAN wrote and approved the language of all collection letters issued by the law firms. Both law firms moved for summary judgment providing affidavits verifying that they were retained by L&T as attorneys to collect the debt, that each firm had complete control over the collection process, that the firm's attorneys supervised all collection activity, that each firm was solely responsible for the content of its communications with Miller, and that no third party including NAN exerted any control over the collection process. The affidavits explained that NAN was merely a software vendor used by the law firms to facilitate the transfer of data about collection accounts.

Miller did not offer any facts in opposing summary judgment but claimed he was entitled to discovery "to determine the extent of review made by [the law firms] of [Miller's] file prior to sending collection letters and initiating litigation" and claimed that "this information is necessary and relevant to the issue of whether [the law firms'] review of [Miller's] file was meaningful." 321 F.3d. at 301. (18a). The District Court granted the law firms' motion for summary judgment, observing that the letters in question were sent on attorney letterhead and held that the "lawyers have done what would be expected of a licensed professional under the circumstances." (45a).

On appeal, the Second Circuit reversed, holding that "merely being told by a client that a debt is overdue is not enough" 321 F.3d at 304 (24a-25a), to satisfy an attorney debt collector's obligation under the FDCPA. The Court relied upon the so-called "meaningful involvement" test used to determine whether an attorney falsely represents his or her status in sending a collection letter on the lawyer's letterhead where the attorney is not otherwise involved in the collection of the account. The Court ruled that Miller, who ultimately became a party opponent in a lawsuit to collect the L&T debt was entitled to "investigate precisely what information [the attorneys] reviewed [from L&T's records], how much time was spent reviewing [Miller's] file, and whether any legal judgment was involved with the decision to send the letters and ultimately to initiate litigation." 321 F.2d at 307. (29a) (emphasis added).

The law firms' petition for rehearing *en banc* (94a-111a) was denied by the Second Circuit. (52a-53a).

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A DEBT COLLECTION ATTORNEY SHOULD BE REQUIRED TO REVEAL TO A DEBTOR FROM WHOM THE ATTORNEY IS SEEKING COLLECTION OF A DEBT PRIVILEGED COMMUNICATIONS FROM THE CREDITOR CLIENT AS WELL AS THE THOUGHT PROCESSES EMPLOYED BY THE ATTORNEY IN EVALUATING THE CLIENT'S CLAIM

The Fair Debt Collection Practices Act (FDCPA) was enacted in 1977 to eliminate abusive, deceptive, and unfair debt collection practices. 15 U.S.C. §1692(a). The FDCPA regulates the conduct of third parties, including attorneys, who regularly collect consumer debts. 15 U.S.C. §1692a(6). The Act generally imposes limitations on communications by debt collectors, (15 U.S.C. §§1692b and c) and prohibits abusive (§1692d), false or misleading (§1692e) or unfair (§1692f) collection practices as defined by the Act. 15 U.S.C. §1692e(3), the provision at issue in this case, prohibits a debt collector from making "the false representation or implication that any individual is an attorney or that any communication is from an attorney".

In this case, the Second Circuit conceded that the collection letters from both W&A and UC&S were from law firms but held that fact alone was insufficient as a

matter of law to demonstrate compliance with §1692e(3). The Court allowed Miller an "opportunity to investigate precisely what information the [lawyers] reviewed from their client, how much time was spent reviewing plaintiff's file, and whether any legal judgment was involved with the decision to send the letters and ultimately to initiate litigation..." Id. at 307 (29a). By allowing this far ranging inquiry, the Court's decision violates the fundamental principles embodied in the attorney-client privilege and the attorney work-product doctrine.

This Court has explained that "[t]he attorney-client privilege is one of the oldest recognized privileges for confidential communications." The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice". Swidler & Berlin v. U.S., 524 U.S. 399, 118 S. Ct. 2081, 2084 (1998) (internal citations omitted). If "the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Upjohn Co. v. U.S., 449 U.S. 383, 392, 101 S. Ct. 677, 684 (1981) (internal citations omitted). Under this fundamental protection, "the client cannot be compelled to answer the question, 'What did you say or write to the attorney?'" Id. at 396, 101 S. Ct. at 686. Yet, that is the precise question posed to the law firms by the Second Circuit's mandate.

In the case at bar, the Second Circuit surmised about the nature of the "customer service notes" transmitted to W&A from its client. W&A did not disclose specific client communications in its affidavits to protect client confidentiality, but instead referred generically to the information provided by L&T. The panel's holding that Miller may obtain "precisely what information" L&T furnished to its attorneys is therefore an extraordinary result that opens attorney-client communication to wide ranging scrutiny by a FDCPA Plaintiff.

In this case, as in all legal matters, the client (L&T) hired attorneys who would exercise their independent legal judgment on its behalf. The duty to exercise this legal judgment is owed only to the client and "an attorney owes no professional duty to a third-party or non-client." First National Bank of Durant v. Trans Terra Co., 142 F.3d 802, 806-07 (5th Cir. 1988) (applying Texas law). For this reason, only a client may pursue a claim against an attorney for breach of duty. See e.g., National Union Insurance Co. v. Dowd & Dowd, P.C., 2 F. Supp. 2d 1013 (N.D. Ill. 1998) (applying Illinois law) and Hi Pockets, Inc. v. The Music Conservatory of Westchester, Inc., 192 F. Supp. 143 (S.D.N.Y. 2002) (applying New York law). The opposing party cannot discover communications between a client and an attorney, otherwise, the attorney's duty of loyalty and fidelity to the client would be irreparably harmed. For this reason, the information that Lord & Taylor provided to their attorneys are privileged communications. Miller is not allowed to discover "precisely what information the [lawyers] reviewed [from L&T]", 321 F.3d at 307 (29a),

because the answer to this inquiry would require the attorney to answer "what did [your client] say or write to [you]" Upjohn v. U.S., at 397, would invade the sanctity of attorney-client communications and would violate the principle of the attorney-client privilege.

The Second Circuit also held that Miller may also inquire about the extent of the legal judgment exercised by the two (2) law firms. The analysis and thought process under which the attorneys examined L&T's claim against Miller is protected by the attorney work-product doctrine. "The notes and memoranda sought ... are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." Upjohn v. U.S., 443 U.S. at 401, 101 S. Ct. at 688 (citations omitted).

Under this opinion, a creditor's lawyer must violate the attorney-client privilege and reveal client communications to negate the allegation that that the attorney has falsely represented that letters come from the attorney. Although there is nothing abusive, unfair or misleading about a creditor retaining an attorney to collect a debt, this decision creates an unprecedented intrusion into attorney confidences and work product under the guise of regulating abusive, unfair and misleading collection practices. Accordingly, review

by this Court is warranted to reaffirm that the two (2) fundamental protections of attorney-client privilege and work product doctrine remain inviolate.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE DECISION IN THIS CASE OPERATES AS A FEDERAL REGULATION GOVERNING THE PRACTICE OF LAW, A POWER RESERVED TO THE STATES BY THE TENTH AMENDMENT.

The power to regulate the practice of law is one reserved to the states in our Federalist system. "Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The states prescribe the qualifications for admission to practice and the standards of professional conduct." Leis v. Flynt, 439 U.S. 438, 442, 99 S. Ct. 698, 700-1 (1979) (emphasis added). The limitations on federal power expressed in the Tenth Amendment is implicated by a regulation governing the practice of law. See, Sperry v. State of Florida, 373 U.S. 379, 83 S. Ct. 1322 (1963). In Sperry, this Court did not have to adopt the Tenth Amendment argument urged by the State of Florida in connection with a state regulation governing patent attorneys because of Constitutional provisions granting the Federal government exclusive power over the issuance of patents.

The Court's decision below holds that it is not sufficient for a lawyer, who has been retained by a client in the traditional sense to accept a case merely

because his client says that a debt is due and owing. 321 F.3d at 304. (24a). The panel concludes that there is an ill-defined minimum amount of information that a client must provide a lawyer, beyond what appears in the record, before a lawyer is permitted to merely send a letter for that client, notwithstanding that the same attorney is vested with complete authority under applicable state regulation and licensing statutes to file lawsuits for creditor clients based upon information and belief as did Miller's lawyers in this suit against the law firms. (58a-62a, 64a, 66a, 68a).

This holding operates as a regulation governing the practice of law by debt collection attorneys and imposes minimum standards of conduct greater than those imposed by the states. Under the panel's decision, a licensed lawyer, who sends a pre-litigation demand and then properly files a suit at a client's request, can nonetheless violate Federal law if the attorney did not review the ill-defined minimum standard of information, even where the lawsuit is successful or is settled, as was the case with L&T's claim against Miller. This result, based upon a carefully drawn statute that balances the rights of a debtor with those of a third-party debt collector, oversteps congressional authority and invades the right to regulate the practice of law, which is reserved to the states by the Tenth Amendment.

This decision profoundly expands the reach of the FDCPA. An attorney in the Second Circuit is subject to varying jury findings as to whether the information provided to an attorney by a client is sufficient for the attorney to handle a claim, even if the

attorney's conduct is proper under state rules of professional conduct and court rules of procedure. Attorneys who handle claims and/or file suit in state courts are therefore subject to a Federal guideline when accepting a consumer claim and filing a lawsuit for a client based upon that claim. A review of this decision is needed to address the exceptionally important question presented by the application of the decision in this case to the power reserved to the states to regulate the practice of law.

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER THE FAIR DEBT COLLECTION PRACTICES ACT IMPOSES HIGHER STANDARDS ON ATTORNEY DEBT COLLECTORS THAN THOSE IMPOSED ON DEBT COLLECTORS WHO ARE NOT ATTORNEYS.

A. A SIGNIFICANT NUMBER OF ATTORNEYS ARE REGULATED BY THE FDCPA

The FDCPA governs attorneys and law firms who regularly represent consumer credit grantors. 15 U.S.C. §1692a(6). Lawyers who handle consumer debt claims for banks, credit unions, credit card issuers, finance companies, retailers and merchants must comply with the FDCPA. In addition, a wide variety of other claims are deemed "consumer debts" under the Act, thereby subjecting attorneys who represent clients in mortgage foreclosures[2], recovery of delinquent

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2 Crossley v. Lieberman, 868 F.2d 566 (3rd Cir. 1989).

homeowners and condominium dues,[3] actions to recover possession of rental property,[4] claims based on dishonored checks,[5] and recovery of local water and sewer charges[6] to the provisions of the FDCPA.

In addition, many sole practitioners and small general practice law firms must comply with the FDCPA. Courts have included within the definition of a "debt collector" under the Act, 15 U.S.C. §1692a(6), lawyers whose debt collection activities represent only a nominal percentage of their practice. *Compare,* Stojanovski v. Strobl and Manoogian, 783 F. Supp. 319 (E.D.Mich. 1992) (four percent (4%) of law firm's practice devoted to debt collection is sufficient to render firm subject to FDPCA) *with* Nance v. Petty, Livingston, Dawson and Devering, 881 F. Supp. 223 (W.D.Va. 1994) (law firm whose debt collection cases comprise sixty-one hundredth percent (.61%) of its practice and account for one point seven hundredth percent (1.07%) of its case filings is not subject to FDCPA).

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3 Newman v. Boehm, Pearlstein & Bright, Ltd., 119 F.3d 477 (7th Cir. 1997), Ladick v. VanGemert, 146 F.3d 1205 (10th Cir. 1998), *cert. den.*, 525 U.S. 1002, 119 S. Ct. 511, 142 L. Ed. 2d 424 (1998).

4 Romea v. Heiberger & Associates, 163 F.3d 111 (2d Cir. 1998)

5 Snow v. Jesse L. Riddle, P.C., 143 F.3d 1350 (10th Cir. 1998), Duffy v. Landberg, 133 F.3d 1120 (8th Cir. 1998), *rehearing denied, cert. den.*, 525 U.S. 821, 119 S. Ct. 62, 142 L. Ed. 2d 49 (1998)

6 Pollice v. National Tax Funding, 225 F.3d 379 (3rd Cir. 2000)

In 1985, there were five thousand (5,000) attorneys regularly engaged in the collection of consumer debts. House Report No. 99-405, 131 Cong. Rec. 1754 (1985). The number of attorneys subject to the FDCPA has multiplied since 1985. As of 2003, ten thousand two hundred eighty-nine (10,289) independent law firms are voluntarily listed with Martindale Hubbell's on-line lawyer directory[7] as practicing in the fields of collections and/or creditor's rights. Empirical evidence concerning the growth of consumer debt since 1985 suggests that the number of law firms whose practice is subject to the FDCPA greatly exceeds the number listed in Martindale Hubbell, given the substantial increase in consumer debt over the past seventeen (17) years. [8]

This Petition should be granted because the issue of whether different standards apply to the substantial number of attorneys subject to the FDCPA, as compared with lay debt collectors, is an important question of federal law that has a pervasive impact on how consumer credit claims are handled by attorneys.

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7 *www.lawyers.com*

8 The dollar amount of outstanding revolving consumer credit has increased 560% since 1985 from $131 billion to $734 billion. Federal Reserve Statistical Release G.19 Historical Data. *www.Federalreserve.gov/release/g19/hist.* Consumer bankruptcy filings rose from 341,233 to 1,539,111 over the same period, an increase of 451%. American Bankruptcy Institute, U.S. Bankruptcy filing statistics. *www.abiworld.org/stats*

B. A UNIFORM INTERPRETATION OF THE FDCPA IS NEEDED TO INSURE THAT DEBT COLLECTION ATTORNEYS ARE HELD TO THE SAME STANDARDS AS LAY DEBT COLLECTORS UNDER THE FDCPA

The FDCPA originally exempted from its provisions "an attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client". In 1986, the attorney exemption was repealed. 15 U.S.C. §1692a(6)(F), repealed by Pub. L. No. 99-361, 100 Stat. 768 (1986). Subsequent to the repeal, this Court determined that all provisions of the FDCPA apply to debt collection attorneys even where the attorney is engaged in litigation. Heintz v. Jenkins, 514 U.S. 291, 294, 115 S. Ct. 1489, 1490-1 (1995). In Heintz, this Court expressed concern that "when Congress later repealed the attorney exemption, it did not revisit the wording of [the Act's] substantive provisions; and... for these reasons, some awkwardness [in applying the FDCPA to attorneys] is understandable." 514 U.S. 291, 295, 115 S. Ct. 1489, 1491. However, this Court did not hold that attorneys would be held to higher standards than lay debt collectors. The Court declined to "authoritatively interpret the Act's conduct-regulating provisions" [Id. at 296, 115 S. Ct. at 1492], because the issue of whether the FDCPA applies to the litigation activities of debt collection lawyers did not require an evaluation of how specific FDCPA provisions prohibiting false and misleading representations, originally written to regulate lay debt collectors, would apply to attorneys engaging in the same conduct.

Circuit Courts have promulgated different standards in evaluating how the conduct regulating provisions of the FDCPA apply to attorneys. On remand from this Court, the Seventh Circuit considered the question of how the FDCPA conduct regulating provision prohibiting attempts to collect amounts not allowed by agreement or authorized by law [§§1692e(2) and 1692f(1)] would apply to a debtor's claim that a law firm sued for amounts not allowed by the creditor's contract with the debtor. The Court held that the FDCPA "does not hold [lawyers] to a different standard...It does not say that the collector's status as an attorney should add a requirement of independent legal analysis for each aspect of the creditor's claim" Jenkins v. Heintz, 124 F.3d 824, 833-34 (7th Cir. 1997), *cert. den.*, 523 U.S. 1022, 118 S. Ct. 1304 (1998) (emphasis added). The Seventh Circuit went on to explain that "[t]o interpret the FDCPA as not to treat lawyers and debt collectors equally would contort the statute's meaning, and ignore Congress' drafting and the Supreme Court's interpretation." Id.

In conflict with the Seventh Circuit, the Second Circuit's decision in this case imposes higher duties upon a law firm that sends a demand letter than upon a collection agency performing the same tasks. The appellate court ruled that lawyers will be held to an enhanced duty of satisfying the requirements of §1692e(3) that communications on the lawyer's letterhead actually came from the attorney. Although the Court eschewed any effort to declare minimum standards for attorney review, it nonetheless held that the FDCPA requires attorneys to conduct an undefined level of review of a client's file and to make an

independent legal judgment as to the validity of a client's claim before communicating with a debtor. The Court concluded that is was not enough in this case that W&A reviewed

> the following information: Miller's full name, social security number, current address, home and work phone numbers, the Lord & Taylor account number, the date the credit account was opened, the date of the last charge to the account, the date the account was charged off, the account balance, and 'a synopsis of (L&T's) recent customer service notes regarding their efforts to resolve Mr. Miller's account prior to forwarding the matter to (W&A) for collection.'

321 F.3d at 296 (4a). The Court explained that, "we cannot conclude that the information in [the debtor's file reviewed by the attorneys] was adequate to make these kind of [legal] judgments." 321 F.3d at 305 (26a). The panel further held that it was not sufficient that the UC&S attorney's affidavit verified that he reviewed Mr. Miller's file and determined "that a summons and complaint should be filed" Id. at 306 (26a) because the affidavit did not demonstrate any basis for the determination that the case should be litigated.

The most awkward provision of the FDCPA, when read to apply to attorneys, is found at §1692e(3), the conduct regulating provision at issue here. This subsection prohibits "the false representation or implication that any individual is an attorney or that

any communication is from an attorney." However, nothing in the language of the statute requires a licensed attorney who is genuinely collecting a debt for a client pursuant to an attorney - client relationship with a creditor to do anything more or less than a lay debt collector handling the same account. Any interpretation of the FDCPA that imposes higher duties on attorneys is therefore "inconsistent with the plain meaning of the statute." Fischer v. U.S. 529 U.S. 667, 120 S. Ct. 1780 (2000). See also, Jenkins v. Heintz, *supra.*

The FDCPA's primary disclosure requirement illustrates why attorneys who genuinely represent a creditor and who have complete authority and control over the collection process should not be treated differently under the Act which requires a debt collector to provide a written disclosure to a debtor in the initial communication or within five (5) days of that initial communication. 15 U.S.C. §1692g. The disclosure must inform a debtor of his or her right to dispute the debt and to demand verification of the debt from the collector. If a demand for verification is made within thirty (30) days of the letter, neither the collection agency nor the attorney may engage in further collection activity until the collector " obtains verification of the debt" and provides verification to the debtor. 15 U.S.C. §1692g(b). This language is an express recognition that the collector will not necessarily have the complete verification in hand when starting the collection process. Instead, the collector must go to the creditor to "obtain" detailed information and then pass the detailed records along to the debtor.

Any interpretation of the FDCPA that would require a debt collector to possess detailed records needed to verify the debt before commencing collection activity is inconsistent with the rule of statutory construction that has been repeated "innumerable times" by this Court that it is not "at liberty to construe any statute so as to deny effect to any part of its language... and that significance and effect shall, if possible, be accorded to every word." Regions Hospital v. Shalala, 522 U.S. 448, 467, 118 S. Ct. 909, 920 (1998), *citing* Washington Market Co. v. Hoffman, 101 U.S. 112, 115-116, 25 L. Ed. 782 (1879).

The term "obtain verification" is only accorded significance and effect by an interpretation that allows debt collectors, whether a collection agency or an attorney, to commence collection activity without possessing detailed account information. Otherwise, the collector's obligation to "obtain" verification would render that clause "meaningless or superfluous" and of no effect if the debt collector attorney were required to have the verification in hand at the beginning of collection activity. See, Beck v. Prupis, 529 U.S. 494, 506, 120 S. Ct. 1608, 1617 (2000). Notwithstanding the application of this fundamental principle of statutory construction, the Second Circuit ruled that a lawyer cannot rely on a client's word that a debt is owed to start the collection process, but must do much more than "check that his client'[s] ...last record showed that the debt was still outstanding" 321 F.3d at 304 (23a).

The express language of the FDCPA does not allow Federal Courts to impose differentiated standards of conduct dependent upon the status of the

debt collector under the FDCPA, as was done in this case. In enacting the repeal of the attorney exemption, Congress merely intended that "distinctions between attorney debt collectors and lay debt collectors be eliminated". House Report 99-405, 131 Cong Rec. 1754 (1985). The elimination of this distinction closed a loophole in which only a collection agency and not an attorney would be liable under §1692e(3) in cases where the collection agency used an attorney letterhead to make it appear that the attorney was hired to collect the debt. The repeal of the attorney exemption did not add a new requirement that a debt collector review certain information in a creditor's file before commencing collection activity or before filing suit against a debtor. The amendment also did not change the law to prohibit an attorney, who serves as a zealous advocate for a client, from relying on the word of the client that a debt is owed.[9] The FDCPA itself, before and after the attorney exemption repeal, imposes no requirement on debt collectors to conduct an independent analysis of a client's claim when

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[9] Fed. R. Civ. Pro. 11(b) allows a lawyer to reasonably rely on a client's version of its claim to support a lawsuit. An action may be filed upon information and belief; the "information" consisting of the client's word that a debt is owed and the "belief" based upon a prior relationship with the client that establishes the client's "word" as reliable. Where an attorney debt collector sends a pre-litigation demand that includes the mandatory disclosures under 15 U.S.C. §1692g, as was done in this case, the attorney is entitled to assume the debt as valid unless the debtor disputes the debt within 30 days after receiving the disclosure. 15 U.S.C. §1692g(3). Although this assumption may not be used in court as an admission of liability, [15 U.S.C. §1692g(c)], the failure to dispute the debt provides further support for an attorney to proceed with collection and/or litigation based upon a client's word that a debt is owed.

collecting or even litigating claims.[10] Although a lawyer's status as a licensed professional may require

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[10] Licensed collection agencies are permitted to accept assignments of accounts and file suit in their own name in 25 states. ARIZONA: Cruz v. Lusk Collection Agency, 580 P.2d 1210 (Ariz. Ct. App. 1978); CALIFORNIA: LeDoux v. Civil Research Corp., 52 Cal. App.3d 451 (1975); COLORADO: Colo. Rev. Stat. Ann. §12-14-111; §12-14-128; §4-9-502, et. seq.; §6-10-102, et. seq (West, WESTLAW through 2003); Commercial Service of Perry, Inc. v. Fitzgerald, 856 P.2d 58 (Colo. Ct. App. 1993); Thibodeaux v. Creditors Services, Inc., 551 P.2d 714 (1976); DELAWARE: Del. Code Ann. Tit. 10 §3902 (West, WESTLAW through 2003); FLORIDA: Fla. Stat. Ann. §559.715 (WESTLAW through 2003) ; HAWAII: Haw. Rev. Stat. UCC §490:9-302, et. seq. (1998); IDAHO: Idaho Code §28-43-202 (1999, WESTLAW through 2003); INDIANA: Ind. Code Ann. §25-11-1-13(a) (West, WESTLAW through 2002); IOWA: Iowa Code Ann. §539.1 (West, WESTLAW through 2002); LOUISIANA: La. Rev. Stat. Ann. §9:3576.19(A) (West, WESTLAW through 2002); MISSISSIPPI: Miss. Code Ann. §11-7-3 (WESTLAW through 2002); MISSOURI: Mo. Rev. Stat. §425.300; MONTNANA: Cameron v. Rea, 112 Mont. 159, 114 P.2d 1060 (1941); NEBRASKA: Archer v. Musick, 25 N.W.2d 908 (Neb. 1947); NEVADA: Nev. Rev . Stat. §649.334 (WESTLAW through 2002); NEW MEXICO: N.M. Stat. Ann. §61-18A-26 (WESTLAW through 2002); NORTH DAKOTA: N.D. Cent. Code §9-11-01 (WESTLAW through 2001); OHIO: Ohio rev. Code Ann. §§1319.11, 1319.12 (West, WESTLAW through 2002); OKLAHOMA: Okla. Stat. Tit. 12, §2017 (West, WESTLAW through 2002); OREGON: Or. Rev. Stat. §697.045(1) (WESTLAW through 2001); PENNSYLVANIA: Pa. Cons. Stat. Ann. §7311(b) (WESTLAW through 2002); SOUTH DAKOTA: S.D. Codified Laws §57A-9-104(6) (Michie 1999); UTAH: Utah Code Ann. §12-1-8 (1998, WESTLAW through 2002); WASHINGTON: Wash. Rev. Code Ann. §4.08.080 (West, WESTLAW through 2003); Washington State Bar Assn. v. Merchants Rating & Adj. Co., 183 WA 611, 49 P.2d 26 (1935); WYOMING: Wyo. Stat. §33-11-114 (1977, WESTLAW through 2002). In states that allow corporations to file suit in their own name, collection agencies are even allowed to appear in court without an attorney. See, e.g., Burgess v. Federated Credit Services, Inc., 365 P.2d 264 (Colo. 1961)

additional duties under governing state ethical rules or court rules of procedure, See. e.g., Fed. R. Civ. Pro. 11(b), those obligations are not incorporated into a debt collector's obligation under the plain language of the FDCPA.

A review of the Second Circuit's decision holding debt collection attorneys to a higher standard is therefore necessary to obtain uniformity of interpretation of the FDCPA and to resolve the question of whether attorneys are held to a higher standard under the Act.

CONCLUSION

This Court should grant this petition to address the important question of whether attorneys who are subject to The Fair Debt Collection Practices Act are held to a higher standard under the Act than lay debt collectors. There are conflicting Circuit Court decisions on this issue and this conflict can only be resolved through an interpretation of the Act by this Court. This Court should also grant this petition because the Second Circuit's decision in this case requires attorneys to reveal confidential communications and work product materials in order to defend an FDCPA action and further operates as a Federal regulation of the practice of law, a power exclusively reserved to the states.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002

Argued: November 12, 2002
Decided: February 25, 2003
[Entered: February 25, 2003]

Docket No. 02-7017

ARTHUR MILLER, on behalf of himself and
all others similarly situated,
Plaintiff-Appellant,

v.

WOLPOFF & ABRAMSON, L.L.P.,
UPTON, COHEN & SLAMOWITZ, and
NATIONAL ATTORNEY NETWORK, INC.,
successor to Wallace & de Mayo, a partnership and
wholly- owned subsidiary of
TSYS Total Debt Management, Inc., individually and
as joint venturers and co-conspirators
with each other,
Defendants-Appellees.

Before: KEARSE, McLAUGHLIN, and SOTOMAYOR,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Reena Raggi, then-District Judge) granting defendants' motions to dismiss and for summary judgment on the grounds that plaintiff failed to state a claim under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* Because we conclude that the grant of summary judgment without allowing plaintiff an opportunity to conduct discovery was premature, we vacate that portion of the decision granting summary judgment on plaintiff's claim that defendants violated the FDCPA by sending debt collection letters purporting to be from attorneys without any meaningful attorney involvement in the sending of those letters. We affirm the district court's grant of the motions to dismiss the remainder of plaintiff's claims, holding that plaintiff's claim regarding the alleged splitting of attorney fees with a non-attorney referral network fails to state a claim under the FDCPA and that the challenged collection letter was neither misleading nor deceptive within the meaning of the FDCPA. Vacated in part, affirmed in part, and remanded.

CHRISTOPHER V. LANGONE, Chicago, IL (Brian L. Bromberg, New York, NY, Lance Raphael, Chicago, IL, on the brief), *for plaintiff-appellant.* THOMAS A. LEGHORN, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York, NY (Brett A. Scher, of counsel), *for defendants-appellees Wolpoff & Abramson and Upton, Cohen & Slamowitz.* KEVIN G. McMORROW, Ahmuty, Demers & McManus, Albertson, NY (Neil H. Angel, on the brief), *for defendant- appellee National Attorney Network, Inc.*

SOTOMAYOR, *Circuit Judge*:

Plaintiff-appellant Arthur Miller appeals the grant of defendants' motions to dismiss and for partial summary judgment by the United States District Court for the Eastern District of New York (Reena Raggi, then-District Judge). Plaintiff claims that defendants-appellees, law firms Wolpoff & Abramson, L.L.P. ("W&A"), Upton, Cohen & Slamowitz ("UC&S"), and the National Attorney Network ("NAN"), a non-attorney referral network that coordinates the practice of debt collection, violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, by sending debt collection letters on attorney letterhead without any meaningful attorney involvement in the decision to send those letters, by attempting to collect attorneys' fees that were to be shared with NAN, and by sending a debt collection letter that was misleading or deceptive.

For the reasons that follow, we hold that the grant of summary judgment on plaintiff's claim that W&A and UC&S failed to conduct a meaningful review of plaintiff's file before sending the debt collection letters on attorney letterhead was premature. We affirm the dismissal of plaintiff's claim that UC&S's efforts to collect attorneys' fees violates the FDCPA's prohibition on attempting to collect an amount not expressly authorized by the agreement creating the debt or by law. We hold that the underlying credit card agreement permitted the collection of attorneys' fees and that the fact that UC&S later may have intended to share those fees with a non-lawyer does not render the attempt to collect such fees illegal, even if that act of

sharing might violate New York professional ethics rules. Finally, we hold that plaintiff's claim that language in W&A's original collection letter overshadows or contradicts the validation notice was properly dismissed because the notice clearly advises the consumer of her FDCPA rights and is neither overshadowed nor contradicted by the language on the front of the letter. Accordingly, we vacate in part, affirm in part, and remand.

BACKGROUND

I. Factual Background[1]

Plaintiff Arthur Miller entered into a credit card agreement with Lord & Taylor. After Miller refused to pay $1618.14 owed on the card, he received a series of letters from defendants W&A and UC&S in connection with their attempts to collect on the debt. W&A regularly represents Lord & Taylor on collection matters, and Lord & Taylor sent the Miller file to W&A for collection assistance. On February 23, 2000, Ronald Abramson, a partner at W&A, reviewed the "file," which contained the following information: Miller's full name, social security number, current address, home and work phone numbers, the Lord & Taylor account number, the date the credit account was

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[1] The facts described below are taken from plaintiff's complaint and are supplemented by the information alleged in affidavits submitted by the defendant attorneys in support of their motions for summary judgment. The Court is aware that plaintiff has not yet had an opportunity to conduct discovery, and recognizes that discovery may reveal that the facts as alleged by defendants are untrue. This summary, therefore, is not intended to preclude any such showing by plaintiff.

opened, the date of the last charge to the account, the date the account was charged off, the account balance, and "a synopsis of [Lord and Taylor's] recent customer service notes regarding their efforts to resolve Mr. Miller's account prior to forwarding the matter to [W&A] for collection." After reviewing this file, Abramson claims he "activated a print command on Wolpoff & Abramson's computer system and W&A's initial collection letter . . . was printed and mailed to the Plaintiff on February 25, 2000."

The February 25, 2000 letter identified W&A as "Attorneys in the Practice of Debt Collection (A National Attorney Network Firm)." The letter demanded payment of "$1618.14 (including applicable contractual charges)," noted that it was sent with regard to May Department Stores/Lord & Taylor, and stated:

> Please be advised that we represent the above-named creditor who claims you have a delinquent balance as stated above. After you have read the important notice on the reverse side of this letter, if appropriate please call our office to resolve this matter.
>
> When paying the balance in full or if you are unable to call our office, check one of the options below and return the bottom portion of this letter in the self-addressed envelope provided for your convenience.

Very truly yours, WOLPOFF & ABRAMSON, L.L.P.

At the bottom of the letter was a "detach and return" section listing four options with boxes for the consumer to check:

> [ ] I mailed a check on _____
>
> [ ] Here is payment in full made payable to the creditor. Thanks for waiting. (If paying by Western Union Quick Collect, for your convenience please see payment instructions on reverse side.)
>
> [ ] Enclosed is payment in full made payable to the creditor, but it's post-dated a few days. (Not applicable for residents of Massachusetts.)
>
> [ ] I cannot call you during the day. Please have someone call me. My telephone number during the day is ___ My telephone number in the evening is ____
>
> *****This is an attempt by a debt collector to collect a debt and any information obtained will be used for that purpose.*****
>
> * * * BEFORE RESPONDING TO THIS LETTER * * *
>
> SEE REVERSE SIDE FOR IMPORTANT NOTICE

On the back of the letter, in larger print than the text on the front of the letter, the following notice was printed:

*** * * IMPORTANT NOTICE * * ***

You are entitled to certain information that sets forth your rights and our obligations under the law. The law provides that: (a) Within five (5) days after the initial communication with a consumer in connection with the collection of any debt, we shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing (1) the amount of the debt, (2) the name of the creditor to whom the debt is owed, (3) unless a consumer, within thirty (30) days after receipt of this notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by this office, (4) if the consumer notifies this office in writing within the thirty day period that the debt, or any portion thereof, is disputed, this office will obtain verification and a copy of such verification will be mailed to the consumer by this office, and (5) upon the consumer's written request within the thirty day period, this office will provide the consumer with the name and address of the original creditor if different from the current creditor. (b) If the consumer notifies this office in writing within the thirty day period that the debt, or any portion thereof, is disputed, or that the

> consumer requests the name and address of the original creditor, we shall cease collection of the debt, or any disputed portion thereof, until this office obtains verification of the debt or the name and address of the original creditor, and a copy of such verification, or name and address of the original creditor, is mailed to the consumer by this office. (c) The failure of a consumer to dispute the validity of a debt under the section may not be construed by any court as an admission of liability by the consumer.
>
> This is an attempt by a debt collector to collect a debt and any information obtained will be used for that purpose.

On April 26, 2000, Miller was sent a second letter, also on W&A letterhead, informing him that:

> All attempts to contact you concerning the above account have proven to be unsuccessful. It is important that you call us at 301-961-7620, or toll free at 1- 800-678-7720 to discuss this matter. We are pleased to inform you that if you call our office within ten (10) days from the date of this letter, YOU MAY QUALIFY FOR A LARGE DISCOUNT ON THE ABOVE MATTER. This is a limited time offer only; you must contact our office within this ten (10) day period.

The letter included a "payment coupon" portion to detach and return with payment.

On May 31, 2000, W&A sent a third letter advising Miller that "[o]ur client has authorized this office to make an extraordinary offer to settle your past-due account with them. We have been permitted to accept $1294.51, which represents 80% of the outstanding balance as settlement in full of your obligation." The letter informed Miller that he had until June 28, 2000 to make a lump sum payment in full, and advised him that if he could not make the entire payment by that date, "please call our office and we will be happy to make reasonable payment arrangements with you on the balance." The letter also instructed that any check or money order should be made payable to the client but sent to W&A's office with the enclosed payment coupon.

Plaintiff did not respond to any of these letters, and on July 12, 2000, plaintiff's file was referred through NAN to UC&S with instructions to initiate litigation promptly. On July 18, 2000, UC&S sent plaintiff a letter demanding payment of $1676.69, and stating in pertinent part: "Please be advised that we are the attorneys for the above creditor. The above referenced account has been forwarded to us for collection. Please contact this office to arrange for payment." This letter, unlike the first three W&A letters, was hand-signed by Mitchell G. Slamowitz, Esq. On August 25, 2000, Attorney Slamowitz filed a verified complaint in Queens County court seeking recovery of $1618.14 and attorneys' fees of

$323.63 for Miller's alleged breach of the credit card agreement with Lord & Taylor. Slamowitz claims that he determined that the underlying credit card agreement authorized payment of attorneys' fees before he filed the complaint.

According to plaintiff, under the agreement between NAN and UC&S, NAN would have been entitled to 3% of any amount ultimately collected by Lord & Taylor as a result of the litigation.[2]

II. Proceedings Below

On February 23, 2001, Miller filed suit against W&A, UC&S and NAN, alleging that defendants, individually and as joint-venturers and co-conspirators, violated the FDCPA (1) by sending debt collection letters on attorney letterhead without meaningful review by any attorney of the circumstances surrounding plaintiff's alleged debt, (2) by attempting to collect attorneys' fees that were to be shared with NAN as a referral fee in violation of state professional ethics rules, and (3) by mailing a letter that would confuse the "least sophisticated consumer" as to his or her rights. Plaintiff brought these claims as a putative class action.

Three months later, before any discovery was conducted, defendants moved to dismiss or alternatively for summary judgment. The motions

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[2] Plaintiff eventually settled the underlying suit and it is undisputed that he paid no attorneys' fees to UC&S because Lord & Taylor obtained new counsel after plaintiff initiated this lawsuit.

relied in part on affidavits submitted by Ronald Abramson, Jay Scheiner, Laurence C. Abramson, Ronald S. Canter, and Mitchell Slamowitz, attorneys at W&A and UC&S involved with sending the debt collection letters and initiating the state court proceeding against Miller. Plaintiff filed a responsive letter motion on June 20, 2001, seeking denial of the motions without prejudice under Fed. R. Civ. P. 56(f), or alternatively, either an expedited discovery schedule or modification of the briefing schedule to permit him time to conduct discovery, including deposing the attorney affiants, before responding to the motions. The letter explained that notwithstanding defendants' reliance on affidavits supporting the motions for summary judgment, "[d]efendants are resisting our efforts to obtain depositions from those affiants that they are using in their motion papers." On July 3, 2001, the district court denied plaintiff's motion and advised that "[t]o the extent the plaintiff wishes to seek relief under Rule 56(f), he should do so in his formal opposition to the pending motions, in a manner compliant with the Rule's requirements." The district court did not address the alternate relief sought by plaintiff. Consistent with this order, plaintiff submitted a Rule 56(f) affidavit from his counsel in opposition to summary judgment detailing the areas where discovery was sought and explaining that defendants had resisted discovery and, as a result, that no discovery had been taken to date.

Following oral argument on November 9, 2001, the district court granted from the bench defendants' motions to dismiss or alternatively for summary judgment. First, the district court held as a matter of

law that the attorney defendants had conducted a sufficiently meaningful review before sending the collection letters. Specifically, the court found, based on the affidavits submitted by the attorney defendants in support of the motions, that "these individuals did more than just peruse a debt notice. Each of them has stated under oath that they reviewed the file and confirmed that the debt was then outstanding - this would be the most important thing to ensure that there was not stale information - to ensure that the correct person's account was at issue." Based on this representation, the district court held that "the lawyer has done what would be expected of a licensed professional under the circumstances . . . ." Denying plaintiff's request under Rule 56(f) for additional discovery, the court held:

> Nothing I've heard today suggests that there would be any benefit in having the attorneys deposed. The parties' dispute is over whether they needed to do more before they could use their letterhead under the law, and I'm satisfied from the cases cited by the defendants in their briefs that these lawyers did what was expected of them under the law for them to use their letterhead to send out the notices."

Next, assuming for purposes of the motions that NAN would have received its fee from UC&S's fee recovery, rather than from Lord & Taylor's total recovery, the district court found that there was a "serious question" whether plaintiff had standing

because "we know that the consumer did not pay the debt under these circumstances." The court went on to consider whether the practices alleged here could be found to have violated the FDCPA, in that "the collection of this amount [the $323.63 sought by UC&S in the state court suit] was either not expressly authorized by the agreement or not permitted by law." Noting that the agreement between Miller and Lord & Taylor expressly provides that if a debt had to be collected through litigation, the consumer might be liable for the debt and reasonable attorneys' fees, the court found that UC&S's 20% contingency fee amounted to only $322.80, a reasonable fee as a matter of law, and the court concluded that sharing $40 of this fee with NAN was not contrary to the agreement. The district court also rejected plaintiff's argument that the payment of fees to NAN was an improper referral fee, stating that "[i]f there is any problem in this referral argument, it is properly addressed not by a jury awarding statutory fees or attorney's fees in a federal action for fair debt collection practice, but by the disciplinary committee of the New York State Supreme Court of Appeals."

Finally, the district court rejected plaintiff's argument that the first dunning letter sent by W&A was impermissibly confusing because the statement that the debtor could call the sender with questions "overshadowed" the notice on the back of the letter advising the debtor that any dispute to the debt must be in writing. The court held:

> It seems to me beyond dispute resolvable as a matter of law that the actual validation notice is complete in its advice to a consumer, even the least sophisticated consumer, that to dispute the debt, actions have to be taken in writing and they will in turn trigger other actions by the debt collector . . . . The suggestion made to this court is that because the attorney also suggested in the cover letter that the recipient of the letter could call the law firm, in other words, actually deal with a human being, that somehow this violated federal law. This is a tortured reading of the letter that could not be found by any reasonable fact finder. The letter's reference plainly makes clear to the recipient that it is the attached validation notice that is the important document and that the call can be made, if necessary. One would understand this to mean if there are further questions, if you need any explanations, but not that the notice about the writing can be ignored.

Miller timely appealed both the July 3, 2001 Order denying his request for discovery and the November 9, 2001 Order granting the motions to dismiss or alternatively for summary judgment.

DISCUSSION

I. Standard of Review

Our standard of review for both motions to dismiss and motions for summary judgment is *de novo*. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (motion to dismiss); *Mario v. P&C Food Markets, Inc.*, 313 F.3d 758, 763 (2d Cir. 2002) (summary judgment). On a motion to dismiss or for judgment on the pleadings we "must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). A case should not be dismissed unless the court is satisfied that the complaint cannot state any set of facts that would entitle the plaintiff to relief. *Id.* On a motion for summary judgment, all factual inferences must be drawn in favor of the non-moving party. *Lane Capital Mgmt., Inc. v. Lane Capital Mgmt., Inc.*, 192 F.3d 337, 343 (2d Cir. 1999). Summary judgment is appropriate only if the moving party shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* Finally, we review the denial of leave for discovery under Fed. R. Civ. P. 56(f) for abuse of discretion. *Belfiore v. N.Y. Times Co.*, 826 F.2d 177, 183 (2d Cir. 1987).

II. The False Representation that a Debt Collection Letter is "From an Attorney"

The FDCPA creates a general prohibition against the use of "false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Section 1692e

contains a non-exhaustive list of practices within the purview of this prohibition, including "[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney." *Id.* § 1692e(3). Although there is no dispute that W&A and UC&S are law firms, or that the letters sent by those firms were "from" attorneys in the literal sense of that word, some degree of attorney involvement is required before a letter will be considered "from an attorney" within the meaning of the FDCPA. *See, e.g., Clomon v. Jackson*, 988 F.2d 1314, 1321 (2d Cir. 1993) ("[T]he use of an attorney's signature on a collection letter implies that the letter is 'from' the attorney who signed it; it implies, in other words, that the attorney directly controlled or supervised the process through which the letter was sent . . . . [T]he use of an attorney's signature implies — at least in the absence of language to the contrary — that the attorney signing the letter formed an opinion about how to manage the case of the debtor to whom the letter was sent.").

Here, plaintiff claims that the letters sent by W&A and UC&S were form letters generated by a computerized debt collection system without any meaningful attorney involvement in the process. Plaintiff also argues that the district court abused its discretion by refusing to allow him to conduct any discovery to enable him to respond to the motions for summary judgment while simultaneously relying on defendants' affidavits to conclude that a meaningful review of the file was conducted by W&A and UC&S. For the reasons that follow, we conclude that the grant of summary judgment on this record was premature.

Defendants moved for summary judgment on May 25, 2001. Plaintiff's counsel informed the district court by letter dated June 20, 2001, that he had attempted to depose the witnesses on whose affidavits defendants' motions were based and that defendants were "resisting our efforts to obtain [those] depositions." In response, defendants' counsel informed the district court only that it had provided similar affidavits to counsel before the lawsuit was filed and that plaintiff's counsel was aware that defendants intended to move for early dismissal of the claims. Defendants do not dispute that plaintiff had no opportunity to depose the lawyers whose affidavits provided the basis for the district court's decision. In response to plaintiff's June 20, 2001 request for additional time to conduct discovery, the district court "denie[d] plaintiff's requests and order[ed] the parties to adhere to the previously approved briefing schedule," noting that if plaintiff wished to file a Rule 56(f) affidavit, he could do so in his formal opposition to summary judgment.

Heeding the district court's advice, plaintiff's counsel filed an affidavit detailing the discovery that was sought and the unsuccessful attempts that had been made to obtain that information. In particular, the Rule 56(f) affidavit explained that plaintiff sought four categories of discovery:

> A) Written and oral discovery to determine and confirm the nature and extent of the relationship between Defendants . . . . This information is necessary and relevant to the issue of joint venture.

> B) Written and oral discovery to determine the nature of the fee-splitting arrangement between Defendants and NAN . . . .
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> C) Written and oral discovery to determine the extent of review made by Defendants of Plaintiff's file prior to sending collection letters and initiating litigation, including any written materials related to review policies *and depositions of Mr. Slamowitz, Mr. Roland M. Abramson, and Mr. Scheiner.* This information is necessary and relevant to the issue of whether Defendants' review of Plaintiff's file was meaningful.
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> D) Written and oral discovery to determine the author and/or source of the debt- collection [letters] sent to consumers by NAN member law firms . . . . This information is necessary and relevant to the issue of whether Defendants misrepresent who is sending the debt-collection letters (an attorney or a non- attorney sending letters on attorney letterhead).

(Emphasis added). The affidavit further explained that plaintiff had attempted to obtain the information through public information sources, but that the specific information sought appeared to be within defendants' sole possession and knowledge. Plaintiff's counsel also stated that plaintiff

had been "unable to obtain the specific information listed above because Defendants have refused to cooperate."

Defendants argue that the district court properly denied the request for discovery. First, they contend that because the initial letter did not comply with Rule 56(f), the district court properly denied it. While the letter did not comply with the Rule, it did promptly request an extension of the briefing schedule to permit time to conduct discovery, and, contrary to defendants' assertion, noted with specificity that plaintiff sought, *inter alia*, to depose the three affiants. We have previously observed that "when alerted to a forthcoming motion for summary judgment, a party wanting more time for discovery should seek, through negotiation with the other party and, if necessary, through application to the district court, an appropriate discovery schedule." *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp*, 769 F.2d 919, 927-28 (2d Cir. 1985). While plaintiff here did not move for a discovery schedule until after the summary judgment motion was filed, it appears from the record that he did so within a month of receiving defendants' motions, which were filed only three months after the complaint was filed. Thus, we do not fault plaintiff for requesting expedited discovery or a modified briefing schedule when alerted to the basis for defendants' motions for summary judgment.

Defendants also argue that plaintiff has waived appeal of the discovery issue by failing to "challenge[] any action taken by the lower court pursuant to his Rule 56(f) affidavit in his notice of appeal . . . ."

W&A/UC&S Br. at 29. Plaintiff appealed both the July 3, 2001 Order denying the letter request for time to conduct discovery and the summary judgment ruling, which granted defendants' motions to dismiss or for summary judgment over plaintiff's objection that he needed additional time to conduct discovery to respond to the motions. The test for determining the sufficiency of a notice of appeal is "whether it is objectively clear that a party intended to appeal." Fed. R. App. P. 3(c) advisory committee note (1993 Amendments). Thus, as it is clear from the face of the notice of appeal that plaintiff challenged both the denial of additional time to conduct discovery and the grant of defendants' motions to dismiss or alternatively for summary judgment, he cannot be said to have waived this issue on appeal.

Finally, defendants contend that the affidavit focused primarily on the relationship between NAN and the two law firms, and that "[t]he only portion of counsel's affidavit relating to the meaningful involvement issue asked for discovery as to 'the extent of review made by (the attorneys) of Plaintiff's file prior to sending collection letters and initiating litigation.'" W&A/UC&S Br. at 30. Defendants maintain that the affidavit was insufficient because it "did not explain how the facts sought to be discovered would create a genuine issue of material fact, particularly where attorney affidavits explaining the nature of both firms' review of Miller's account were already in the record." *Id.* We disagree.

"[A] party resisting summary judgment on the ground that it needs discovery in order to defeat the motion must submit an affidavit showing '(1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts.'" *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999) (quoting *Meloff v. N.Y. Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir. 1995)) (alteration in original). Here, the affidavit sought discovery in four discrete categories, the last two of which were directly related to the "meaningful involvement" claim at issue here. The affidavit explained that plaintiff required information about the extent of defendants' review of the file. As this was the critical issue in plaintiff's claim that sending the letter on attorney letterhead violated the FDCPA, these missing facts reasonably could have created a genuine issue of material fact to defeat summary judgment. Moreover, defendants' contention that the affidavit was silent as to the steps taken to obtain additional information without discovery ignores the fact that the affidavit stated that the information sought was within defendants' possession and that defendants had resisted discovery. Inasmuch as plaintiff clearly explained that he sought to depose the three affiants, this satisfies the third and fourth requirements of Rule 56(f). Thus, the affidavit substantially complied with the requirements of Rule 56(f).

While the affidavit did not specify with precision the information plaintiff believed he could learn from deposing the three affiants, plaintiff cannot be faulted for failing to advise the district court precisely what information he might learn during discovery given that the facts sought were exclusively within defendants' possession and that he had no previous opportunity to develop the record through discovery. *See Meloff*, 51 F.3d at 374 (reversing grant of summary judgment in an employment discrimination case where plaintiff had insufficient opportunity "to explore the motivations and reasons for terminating her employment"); *cf. Fitzgerald v. Henderson*, 251 F.3d 345, 362 (2d Cir. 2001) (observing that where the district court denied the plaintiff any opportunity to conduct discovery and considered a partial summary judgment motion filed two months after the filing of the complaint, "[f]aulting [plaintiff] for failure to make a showing of . . . matters that would . . . be beyond her personal knowledge [] was incompatible with the court's denial of discovery").

"Fed. R. Civ. P. 56(f) provides, as interpreted by court opinions, that when a party facing an adversary's motion for summary judgment reasonably advises the court that it needs discovery to be able to present facts needed to defend the motion, the court should defer decision of the motion until the party has had the opportunity to take discovery and rebut the motion." *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 386 (2d Cir. 2001). Accordingly, we have held that summary judgment should only be granted if "*after discovery*, the nonmoving party has failed to make a sufficient showing on an essential element of [its]

case with respect to which [it] has the burden of proof." *Hellstrom v. United States Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) (internal quotation marks omitted) (alterations in original). "Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery." *Id.*; *accord Trebor Sportswear Co. v. The Ltd. Stores, Inc.*, 865 F.2d 506, 511 (2d Cir. 1989) ("Under Rule 56(f), summary judgment may be inappropriate where the party opposing it shows . . . that he cannot at the time present facts essential to justify his opposition. The nonmoving party should not be 'railroaded' into his offer of proof in opposition to summary judgment. The nonmoving party must have had the opportunity to discover information that is essential to his opposition to the motion for summary judgment." (internal quotations and citations omitted)).

The district court concluded that no discovery was necessary in this case because "[t]he parties' dispute is over whether they needed to do more before they could use their letterhead under the law, and I'm satisfied from the cases cited by the defendants in their briefs that these lawyers did what was expected of them under the law for them to use their letterhead to send out the notices." The district court held that the fact that Mr. Abramson had "checked that his client, Lord & Taylor's, last records showed that [the] debt was still outstanding" satisfied defendants' obligations. Given the very limited nature of the material Mr. Abramson claimed to have reviewed, however, the district court's conclusion could only be based on the fact that Lord & Taylor had reported the debt for collection to W&A with an outstanding balance and

Lord & Taylor's "synopsis" of its "recent" customer service notes indicated that plaintiff had offered a reduced payment, which had been refused.[3]

While plaintiff asks us to declare a minimum standard requiring attorneys to review a copy of the contract, a credit report, and a full payment history or statement of account to satisfy *Clomon*'s requirement of meaningful attorney involvement, we decline to do so on the record here, in part because there may be circumstances where, following discovery, it becomes clear that the attorney's familiarity with the client's contracts and practices would negate the need to review some if not all of the documents plaintiff seeks to require. For example, an attorney and client could have established a practice whereby the attorney has specified that the entire payment history is to be included in the summary provided by a client. On this undeveloped record, however, it suffices for us to hold that merely being told by a client that a debt is overdue

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[3] W&A partner Ronald Abramson stated that he reviewed plaintiff's "file" after it was referred by Lord & Taylor before sending the initial letter. Mr. Abramson averred that the "file" contained plaintiff's name, social security number, current address and home and work phone numbers, the account number, the date the account was opened, the date of the last charge on the account, the date the account was charged off and the account balance, as well as "a synopsis of [Lord & Taylor's] recent customer service notes regarding their efforts to resolve Mr. Miller's account prior to forwarding the matter to our firm for collection. These notes included a reference to the fact that Mr. Miller had offered a reduced payment on his account and that Lord & Taylor refused to accept less than what was owed." The affidavit does not, however, state whether the file contained the payment history, if any, on the account or a complete record of Lord & Taylor's customer service notes.

is not enough. *See Nielsen v. Dickerson*, 307 F.3d 623, 638 (7th Cir. 2002) (holding that the FDCPA was violated where the attorney "knew nothing about the debtor and her potential liability beyond what [the client] had conveyed to him; and [the client] provided [the attorney] only the bare information that [he] required in order to complete the blanks in his form letter").

Defendants argue that their affidavits make clear that they satisfied the FDCPA's requirement of meaningful attorney involvement. These affidavits, however, lack sufficient detail to permit the district court or us to determine that their review was sufficient as a matter of law. For example, Mr. Abramson stated that:

> I was the partner who personally reviewed our client's file on [Miller] after it's [sic] referral to W&A. No collection activity can take place until a partner reviews our client's file and exercises his or her independent professional judgment that collection is appropriate. At that time, the partner must personally execute the print command of the letter which will be sent to the debtor.

This conclusory language does not describe what information Abramson reviewed to permit him to exercise his "independent professional judgment." We must assume for purposes of this motion for summary judgment, however, that it was no more than the very limited information described in his initial affidavit. Thus, while Abramson claimed that W&A attorneys

reject or suspend debt-collection referrals "for a multitude of reasons including the matter falling outside of the applicable statute of limitations, the debtor filed bankruptcy making the obligation unenforceable, and the information in the client record is inconsistent or incomplete," and asserted that "[a]fter my personal review of Mr. Miller's file, I determined that collection was, in fact, appropriate and that none of the aforesaid reasons for suspension or rejection of the referral was appropriate," the information Abramson initially claimed that he reviewed would not enable him to determine whether Miller was in bankruptcy, whether the information in the record was inconsistent or incomplete, whether Miller was or was not obligated to pay the debt, or whether Miller was the correct debtor. Similarly, Abramson's assertion that "attorneys at W&A regularly reject client referrals after a review of the client file indicates the debtor is not obligated to pay the account, the alleged debtor is not the correct debtor as well as a determination from an attorney at W&A that additional information is necessary to support the claim," does not entitle W&A to summary judgment on this record because we cannot conclude that the information in plaintiff's file was adequate to make these kind of judgments.

In addition, the affidavit submitted by UC&S partner Mitchell Slamowitz describing the steps taken by UC&S before its July 18, 2000 letter was sent merely stated that he reviewed the file sent by W&A through NAN software, which included "Mr. Miller's full name, social security number, current address, telephone number, the Lord & Taylor account number,

the amount of the debt, and a notation that Mr. Miller was an attorney. . . . After reviewing the file, I made the decision to send a letter to Mr. Miller and I personally signed the letter, dated July 18, 2000." This too is insufficient to support the conclusion as a matter of law that any professional judgment was exercised before UC&S sent its collection letter.[4] *Cf. Boyd v. Wexler*, 275 F.3d 642, 646 (7th Cir. 2001) ("Before a follow up letter can be responsibly approved by a lawyer, he must inspect the file to determine that there has been no partial payment or other response from the debtor . . . ."). Similarly, while Slamowitz stated that "[a]t the time of this initial review of Mr. Miller's file, I also determined that a summons and complaint should be filed if Mr. Miller did not respond to the letter dated July 18, 2000," the affidavit does not demonstrate any basis for this determination.

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[4] The affidavit of Ronald Canter describes the sending of the April 24, 2000 and May 29, 2000 letters, based on Canter's review of W&A's "file" and "a review of activity that had taken place on Mr. Miller's account since W&A mailed him an initial collection letter. This review included reference to several unsuccessful attempts to contact Mr. Miller by telephone to discuss the account." Canter further stated that when Miller failed to respond to the April 24, 2000 follow-up letter, "I authorized the printing and mailing of an offer to Mr. Miller to settle for a reduced amount in order to avoid litigation. . . . When Mr. Miller failed to respond to any communications from our office, [W&A] forwarded his account for litigation to the law firm of Upton, Cohen and Slamowitz on July 12, 2000." There is no evidence in the record that W&A requested or received any additional information from Lord & Taylor before forwarding the account to UC&S for litigation.

Finally, we also note that plaintiff claims that W&A takes in over 55,000 new collection accounts monthly via electronic transmission.[5] If plaintiff's account is typical, this suggests that W&A could have mailed over 110,000 letters a month. While defendants argue that this fact is not in the record and that plaintiff's emphasis on electronic transmission is "factually and legally irrelevant," if discovery in this case were to reveal that W&A and UC&S handled this high volume of accounts, received only the limited information described in the attorney affidavits, reviewed the collection files with such speed that no independent judgment could be found to have been exercised, and then issued form collection letters with the push of a button, a reasonable jury could conclude that W&A and UC&S lacked sufficient professional involvement with plaintiff's file that the letters could be said to be from an attorney. *See, e.g., Nielsen*, 307 F.3d at 637 ("[T]he numbers (recall that [the client] referred [the attorney] an average of some 2,000 accounts per month) and assembly-line fashion in which [the attorney's] letter was issued betray the purely nominal nature of his participation in the collection process."); *Boyd*, 275 F.3d at 648 (holding that the high volume of mail handled by a debt-collecting attorney was relevant to his credibility where the attorney claimed in an affidavit to have reviewed plaintiff's file before sending letter, because the volume

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[5] With no apparent irony despite their successful efforts to resist discovery, after plaintiff informed the district court that W&A took in over 55,000 new collection accounts monthly, "going name, account, last payment date; name[,] account, last payment date, okay, beep, beep, beep, letter, letter, letter," defendants objected to the consideration of this information because it was "not in the record; it's not true."

of mail suggested both that the attorney might not have had time to review the file and that he might not remember accurately).

If, on the other hand, it becomes clear after discovery that W&A and UC&S do indeed review information reasonably calculated to permit them to make the kind of determinations Abramson claims to have made before sending the collection letters, the letters would be in compliance with the FDCPA. *See, e.g., Nielsen*, 307 F.3d at 638 ("[A]n attorney must have some professional involvement with the debtor's file if a delinquency letter sent under his name is not to be considered false or misleading in violation of section 1692e(3) and (10)."); *Boyd*, 275 F.3d at 648 (requiring some showing of "professional judgment concerning the existence of a valid debt" before an attorney may send a collection letter); *Clomon*, 988 F.2d at 1321 ("[T]he use of an attorney's signature implies—at least in the absence of language to the contrary—that the attorney signing the letter formed an opinion about how to manage the case of the debtor to whom the letter was sent.").

In sum, by relying on the attorneys' affidavits and not allowing plaintiff any opportunity to investigate precisely what information the affiants reviewed, how much time was spent reviewing plaintiff's file, and whether any legal judgment was involved with the decision to send the letters and ultimately to initiate litigation – facts not clearly addressed in defendants' conclusory affidavits but highly relevant to the affiants' credibility and to whether the letters complied with the FDCPA – the grant of summary judgment on this claim was premature.

III. UC&S's Attempt to Collect Attorneys' Fees

Plaintiff also argues that because the FDCPA makes it illegal to attempt to collect an amount not "expressly authorized by the agreement creating the debt or permitted by law," 15 U.S.C. § 1692f(1), the filing of the state court complaint by UC&S seeking $323.63 in attorneys' fees violates the FDCPA. While plaintiff does not dispute that the credit card agreement here provided for payment of attorneys' fees, he contends that Ohio law prohibits collection of attorneys' fees in any consumer contract of adhesion and that the contingent 20% fee sought by UC&S was to be shared with NAN, in violation of New York's professional ethics rules. Thus, plaintiff's argument goes, the fees UC&S sought to collect cannot be said to be authorized by the agreement or by law.

As an initial matter, we conclude that plaintiff has waived the argument that the collection of attorneys' fees is barred by Ohio law. Miller did not allege in the complaint that attempting to collect attorneys' fees under a contract of adhesion violates Ohio law, nor did he raise this issue in opposition to the motion to dismiss or at oral argument. Significantly, plaintiff also never sought to amend the complaint to assert this claim. Accordingly, he cannot now rely on it as a basis for his FDCPA claim. *See Caiola v. Citibank, N.A.*, 295 F.3d 312, 327 (2d Cir. 2002) ("[W]e generally do not consider arguments not raised below..").

Defendants maintain that plaintiff lacks standing to pursue this claim because it is undisputed that plaintiff never paid *any* attorneys' fees to either UC&S or

NAN, as the underlying lawsuit initiated by UC&S was settled with different counsel. Accordingly, defendants argue that plaintiff did not suffer any identifiable injury. The FDCPA provides for liability for attempting to collect an unlawful debt, however, and permits the recovery of statutory damages up to $1,000 in the absence of actual damages. Thus, courts have held that actual damages are not required for standing under the FDCPA. *See, e.g., Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) ("[T]he plaintiff who admittedly owes a legitimate debt has standing to sue if the Act is violated by an unprincipled debt collector."); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 777 (9th Cir. 1982) (same); *cf. Gambardella v. G. Fox & Co.*, 716 F.2d 104, 108 n.4 (2d Cir. 1983) (noting that "[i]t is well settled . . . that proof of actual deception or damages is unnecessary to a recovery of statutory damages" under the Truth in Lending Act). Accordingly, we join those courts and hold that the fact that plaintiff did not ever pay any attorneys' fees to NAN does not necessarily suggest that he was not injured for purposes of his FDCPA claim, if he can show that UC&S *attempted* to collect money in violation of the FDCPA.

We therefore turn to the dispositive question before us: whether the fees sought to be collected were not permitted by the contract or by law. Miller argues that the $323.63 sought by UC&S in the verified complaint was not an amount permitted by law because UC&S intended to share some portion of the fee with NAN in violation of state ethics rules. We find no support for plaintiff's position that an attorney violates the FDCPA by attempting to collect a facially reasonable fee – consistent with the terms of the

underlying agreement – with the intent later to use the money in some otherwise prohibited manner.[6] Miller also argues even if a violation of state professional ethics rules does not give rise to a private right of action, it is evidence that defendants violated the FDCPA, noting that "many of the express prohibitions of the FDCPA involve conduct that would also be a violation of a lawyer's ethical standards." Appellant's Br. at 30. Even if this is true, however, plaintiff's cause of action under § 1692f(1) requires a showing that defendants attempted to collect an amount not expressly permitted either by the agreement creating the debt or by law. In other words, plaintiff states a claim *only* if the $323.63 sought by UC&S in the state court complaint was not permitted by the Lord & Taylor agreement or by law. Thus, the cases cited by plaintiff where courts have considered certain conduct that violates professional ethics rules as also deceptive or misleading in violation of the FDCPA's prohibition of the use of "false, deceptive or misleading representation[s]," 15 U.S.C. § 1692e, or as violative of other FDCPA provisions, are inapposite. *See* Appellant's Br. at 31; Appellant's Reply Br. at 12-13.

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[6] Plaintiff also asserts that UC&S consistently seeks a 20% fee without ascertaining whether the fee is reasonable. The fee sought here, however, was only $323.63, and plaintiff does not allege that this fee is unreasonably high. As the district court observed, "I can't imagine anything that a lawyer does not generating at least 322 [sic] dollars in fees. So I cannot say that that amount was excessive or unreasonable given what went on here, the sending of a few letters or, therefore, that Upton Cohen's alleged sharing of part of that fee, some 40 dollars, with the network that referred them to the client, was contrary to the express authorization of the agreement to also be liable for attorney's fees here."

In summary, plaintiff challenges not the reasonableness of the fee itself but rather what UC&S later intended to do with its fee. The district court correctly found that plaintiff failed to state a claim in that the amount UC&S sought to collect was permitted by the agreement and was not prohibited by law.[7]

IV. The W&A Collection Letter

Finally, Miller argues that the district court erroneously granted defendants' motion to dismiss his claim that the February 25, 2000 collection letter sent by W&A violates § 1692g because it would confuse the least sophisticated customer as to his or her rights under the FDCPA. On appeal, Miller raises three objections to the letter: (1) the failure of the checklist on the front of the letter to include an option to request validation of the debt could confuse a consumer, notwithstanding the notice on the reverse of the letter advising that requests for debt- validation must be in writing; (2) the validation notice itself is deceptive because it suggests that the listed information is an exclusive listing of a consumer's rights under the FDCPA; and (3) the listing of forty-four cities as "NAN affiliates" on the letterhead is misleading because it could suggest to a consumer that W&A was admitted to practice law in all of those jurisdictions.

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[7] We therefore do not reach defendant NAN's alternative arguments that it cannot be held liable under the FDCPA because it is not a debt collector within the meaning of the FDCPA nor do we reach the argument advanced by all defendants that the proposed fee sharing agreement between NAN and the affiliate law firms comports with New York professional ethics rules. We express no view on that issue.

Defendants again raise a preliminary issue of waiver. Plaintiff's complaint alleges that the letter was misleading because it identified only certain FDCPA rights (Complaint, at ¶ 77), and instructed the consumer to call W&A to resolve the matter (Complaint, at ¶¶ 88-92). In opposition to the motion to dismiss, plaintiff argued only that the letter violated the FDCPA because "a reasonable reading of the notice on [the] initial debt collection letter is that consumers have only the rights specified in the letter and not others." Pl. Opp. to Mot. to Dismiss, at 19-21. Finally, when asked by the district court at oral argument to articulate how the letter violated the FDCPA, plaintiff explained:

> The validation notice says, after reading the notice, call if appropriate. A call is not sufficient to preserve your rights under the FDCPA . . . . As a matter of fact, the only thing that the notice encourages [consumers] to do in writing is to check those various boxes . . . . None of these boxes assume that I contest this debt.

Accordingly, because plaintiff was given numerous opportunities to clarify the claims at issue, and failed to raise the claim that listing the forty-four NAN affiliated firms was deceptive or misleading at any time before this appeal, we find this argument to be waived. *See Caiola*, 295 F.3d at 327. As previously noted, 15 U.S.C. § 1692e bars the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." In addition, 15 U.S.C. § 1692g requires debt collectors to

include a "validation notice" either in the initial communication with a consumer in connection with the collection of a debt or within five days of that initial communication, which must inform the consumer that he or she has certain rights, including the rights to make a written request for verification of the debt and to dispute the validity of debt. *See* 15 U.S.C. § 1692g(a).

"When determining whether § 1692g has been violated, an objective standard, measured by how the 'least sophisticated consumer' would interpret the notice received from the debt collector, is applied." *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir. 1996) (citing *Clomon*, 988 F.2d at 1318 (holding that the least sophisticated consumer standard applies to whether § 1692e has been violated)). "When a notice contains language that 'overshadows or contradicts' other language informing a consumer of her rights, it violates the Act." *Id.* (citing *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991)). "A debt collection notice is overshadowing or contradictory if it fails to convey the validation information clearly and effectively and thereby makes the least sophisticated consumer uncertain as to her rights." *Savino v. Computer Credit, Inc.*, 164 F.3d 81, 85 (2d Cir. 1998).

In *Russell*, as in the instant case, the back of the notice included a validation notice that complied with the FDCPA. The front of the *Russell* letter, however, instructed the debtor, in all capital letters, that "If you do not dispute this claim (see reverse side) and wish to pay it within the next 10 days we will not post this collection to your file. . . . It is our practice to post unpaid collections in the amount of $25 or more to

individual credit records." *Russell*, 74 F.3d at 34. We found that this notice was contradictory because the least sophisticated consumer "could readily believe – despite the inclusion of the validation notice – that were she to take any course other than payment to Equifax within 10 days, it would permanently affect her credit record." *Id.* Similarly, in *Savino*, we held that a debt collection letter stating that "[t]he [creditor] insists on immediate payment or a valid reason for your failure to make payment" was contradictory, despite the inclusion of the validation notice on the back of the letter, because the least sophisticated consumer could be confused by the "decision to ask for immediate payment without also explaining that its demand did not override the consumer's rights under [§ 1692g] to seek validation of the debt." 164 F.3d at 85, 86.

The W&A letter clearly advises the reader, in the main body of the letter, "*[a]fter* reading the important notice on the reverse" to "call our office to resolve this matter" "*if appropriate.*" (emphasis added). The notice on the back, in turn, correctly instructs consumers that they should notify W&A in writing to request verification of the debt or to dispute the debt, while the front of the letter instructs the recipient that "[w]hen paying the balance in full or if you are unable to call our office, check one of the options below and return the bottom portion of this letter . . . ." While the options detailed on the bottom of the letter do not include requesting validation of the debt, the bottom of the letter states in large-print, capital letters, "BEFORE RESPONDING TO THIS LETTER SEE REVERSE SIDE FOR IMPORTANT NOTICE." Thus, the reader is directed to the correct validation notice in several places, and is thereby

advised of his or her FDCPA rights. *See McStay v. I.C. Sys., Inc.*, 308 F.3d 188, 191 (2d Cir. 2002) ("[W]hen a prominent instruction in the body of the letter warns that there is important information on the reverse side, a reasonable reader, even if unsophisticated, would turn the paper over and read the back.").

With these repeated instructions to review the validation notice on the back of the letter before responding to the letter, even the least sophisticated consumer would realize that it is "appropriate" to contact W&A's office by phone only if the consumer did not wish to exercise his or her FDCPA rights as outlined on the reverse of the letter. Where a validation notice plainly specifies that FDCPA contact must be in writing, and nothing on the front of the letter suggests in any way that an instruction to call was intended to override the requirements outlined in the validation notice, we do not believe that a reasonable consumer – having twice been instructed to review the validation notice *before* taking any further action – who wished to exercise his or her FDCPA validation rights could be misled into thinking that the clear obligation to request validation in writing was somehow modified by either the invitation to call if appropriate or the four options on the bottom of the letter. As this Court noted in *Clomon*, "courts have consistently applied the least-sophisticated-consumer standard in a manner that protects debt collectors against liability for unreasonable misinterpretations of collection notices." 988 F.2d at 1319. We therefore agree with the district court's conclusion that the letter was not misleading or deceptive on these grounds.

Finally, plaintiff argues that the letter is deceptive because the validation notice, which states that the recipient "is entitled to certain information that sets forth your rights and obligations under the law," and then describes what "[t]he law provides," incorrectly suggests to the least sophisticated consumer that the listed information is an exclusive list of a consumer's FDCPA rights. Plaintiff does not, however, dispute that the notice includes everything that the law requires be included in the validation notice. Because a consumer has no right to written notice about his or her other FDCPA rights, we do not find this language misleading or deceptive. *See Savino*, 164 F.3d at 86 (holding that the language at issue in that case was insufficient under the FDCPA, and proposing as an acceptable alternative the following notice: "Although we have requested that you make immediate payment or provide a valid reason for nonpayment, you still have the right to make a written request . . . for more information about the debt. *Your rights are described on the reverse side of this notice.*") (emphasis added). Further, by advising that the FDCPA entitles a debtor to "certain information," the letter itself addresses plaintiff's concern, and cannot reasonably be read as suggesting that the rights described in the notice are an exclusive listing. Accordingly, the initial collection letter sent by W&A was not false, deceptive or misleading as a matter of law, and the motions to dismiss this claim were properly granted.

CONCLUSION

For the foregoing reasons, we vacate the grant of summary judgment on plaintiff's claim that W&A and UC&S violated the FDCPA by sending debt collection letters that purported to be, but were not in any meaningful way, "from" attorneys and remand for further proceedings, including discovery, on this claim. We affirm the grant of the motions to dismiss the two remaining claims.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT, E.D.N.Y
★NOV 28 2001★

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JUDGMENT
01-CV-1126(RR)

———————————— X

ARTHUR MILLER,
Plaintiff,

-against-

WOLPOFF & ABRAMSON, L.L.P.,
UPTON, COHEN & SLAMOWITZ, and
NATIONAL ATTORNEY NETWORK, INC.

———————————— X

An Order of Honorable Reena Raggi, United States District Judge, having been filed on November 19, 2001, granting in full, the defendant's motions to dismiss and for summary judgment, for the reasons given on the record at the hearing on November 9, 2001; it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendants; and the defendants' motions to dismiss and for summary judgment are granted.

Dated: Brooklyn, New York
November 20, 2001

/s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

RAGGI, District Judge:

For the reasons given on the record at the hearing on November 9, 2001, the defendants' motions to dismiss and for summary judgment are hereby granted in full. The clerk of the court is directed to mark this case closed.

SO ORDERED.

Dated: Brooklyn, New York
November 13, 2001

/s/ Reena Raggi
REENA RAGGI
UNITED STATES
DISTRICT JUDGE

* * *

original creditor, we shall cease collection of the debt or any disputed portion thereof until this office obtains verification of the debt or the name and address of the original creditor, and a copy of such verification or name and address of the original creditor is mailed to the consumer by this office.

Now that, I think we all agree, is the written opportunity to dispute that a consumer must be advised of.

MR. LEGHORN: Correct.

THE COURT: The confusion the plaintiff says is attributable to the wording in the letter that they can write, they can call; is that correct? And the copy of that letter - -

MR. LEGHORN: It would be the page immediately preceding what you were just looking at, your Honor.

THE COURT: And that's the sentence that says: Please be advised that we represent the above-named creditor who claims you have a delinquent balance as stated above. After you have read the important notice on the reverse side of this letter, if appropriate, please call our office to resolve this matter.

Okay?

MR. LEGHORN: Yes.

THE COURT: That's the suggestion, that that creates the confusion as to whether you should call or write?

MR. LEGHORN: Correct, your Honor. And the case of Terry versus Kaplan that we cited pointed out the same exact arguments plaintiff has here, that there was a suggestion or an offer to call the office in addition to but not in lieu of.

The validation notice was not violative of the statute, and the court focused on the fact that, like in this situation, there was no threatening language in the paragraph, saying the opportunity to call was available. It was in the same typeface, same font, it wasn't disgusting, masking or hiding the validation notice.

This situation is all square with the Terran case, and I respectfully urge that that case follows the true intent of the statute, and even the one cited by plaintiff. All of the references for phone calls were tied in with threatening language, or the validation notice was in such small font in comparison to the other that it was somehow hidden.

THE COURT: Let me return this to you.

Anything else?

MR. LEGHORN: Yes. I would just like to respond to the fact that when counsel was speaking there was reference to many facts that are not in this record and have not been put in this record.

One, there is nothing in the record before this court that we ever knew with respect to a letter being sent by Mr. Miller. That's not before the court. There has never been anything in the record that Mr. Miller ever disputed this debt.

Secondly, with respect to the review done by the attorneys, plaintiff's own 56.1 statement acknowledged with respect to the Upton firm that they reviewed everything necessary under the statute; that the file was referred from Wolpoff & Abramson, Mitchell Slamowitz reviewed the file, the file included relevant information. This is from plaintiff's own 56.1 statement.

It's hard to see how meaningful review can be alleged in contravention of that, and the statements by counsel that there wasn't meaningful review, once again, are his comments. We have nothing here, nothing.

His reference to the computer generated material runs contrary to what we have here before the lawyers, both from Wolpoff & Abramson and Upton Cohen, that they received the file material, they reviewed it, they acted upon it. This was not, as the complaint alleged, a computer driven operation and that there was no individual review.

Another comment was made that there were 55 thousand files a month. That is not in the record; it's not true.

Unless the court has any other comments, thank you.

THE COURT: Anything else?

I did give considerable time to looking at the papers in this case to try to ensure that I understood the parties' position. I am satisfied that the defendants should prevail on this motion. Let me state my reasons on the record.

First of all, with respect to the most traditional of the claims brought, that the attorneys' use of letterhead was potentially intimidating to the least sophisticated consumer, which we all recognize Mr. Miller was not - - but that is the standard of review - - I find that no facts have been adduced, nor are likely to be developed in discovery, that would support this claim.

I have the affidavits from lawyers at both the defendant law firms, and they adequately establish that lawyers in these firms did conduct the sort of meaningful review that the courts deem necessary for a lawyer to put his letterhead on a debt collection letter.

Specifically, these individuals did more than just peruse a debt notice. Each of them has stated under oath that they reviewed the file and confirmed that the debt was then outstanding - - this would be the most important thing to ensure that there was not stale information - - to ensure that the correct person's account was at issue. These are the kind of mistakes that can easily occur when something is treated perfunctorily or when computers or technology are relied upon to send out notices.

Instead, in the case of the letters sent to Mr. Miller by the two defendant law firms, before those letters went out, lawyers did take the responsibility for ensuring that this debt was still outstanding and therefore sent the notice letter.

Counsel for plaintiff has argued that what is deceptive here, what is intimidating, is the fact that these lawyers were representing that they were part of a national institution that was involved in this kind of practice, but I don't understand that to be the problem here.

The problem was that they used attorney letterhead, and the assumption is that an attorney has reviewed a claim and found it meritorious. I don't think that means that an imaginative lawyer bringing a claim can't say, Well, he could have done this or he could have done something more. It's whether the lawyer has done what would be expected of a licensed professional under the circumstances, and here I'm satisfied from the affidavits that that was done.

Nothing I've heard today suggests that there would be any benefit in having the attorneys deposed. The parties' dispute is over whether they needed to do more before they could use their letterhead under the law, and I'm satisfied from the cases cited by the defendants in their briefs that these lawyers did what was expected of them under the law for them to use their letterhead to send out the notices.

The next question concerns confusion with respect to the validation notice. I have looked at the validation notice last weekend in preparing for this motion, and wanted to look at it once more today to ensure that I had not overlooked anything.

It seems to me beyond dispute resolvable as a matter of law that the actual validation notice is complete in its advice to a consumer, even the least sophisticated consumer, that to dispute the debt, actions have to be taken in writing and they will in turn trigger other actions by the debt collector; namely, cessation of debt collection efforts for a discrete period of time while certain things are checked.

The suggestion made to this court is that because the attorney also suggested in the cover letter that the recipient of the letter could call the law firm, in other words, actually deal with a human being, that somehow this violated federal law.

This is a tortured reading of the letter that could not be found by any reasonable fact finder. The letter's reference plainly makes clear to the recipient that it is the attached validation notice that is the important document and that the call can be made, if necessary. One would understand this to mean if there are further questions, if you need any explanations, but not that the notice about the writing can be ignored.

The fact that I have to view this from the light of the least sophisticated consumer does not mean that the court has to accept that a consumer will ignore what is staring him straight in the face.

I do not see the defendants in this case as having violated federal law by suggesting to a consumer that if they needed to talk to a person about what went on they should feel free to call. This was not that deceptive practice.

Finally, it's been suggested that the plaintiff should be allowed to sue here, as we have now discussed, for statutory damages and attorney's fees, not for any actual damages, because one of the defendant law firms, the Upton firm, had an arrangement with the National Attorneys Network for the referral of this case.

Now, the defendants have explained to the court that had the debt been collected by the Upton Cohen firm, NAN would have received a modest payment, not from Upton Cohen but from Lord & Taylor, out of its percentage of the debt.

The plaintiff says that that is not clear, and rather than go through all the papers that I have before me, for purposes of this ruling, I'm going to assume that there is a question about that and that it could possibly be resolved in favor of finding out that the money would have come out of the Upton Cohen share of the monies collected.

First of all, we know that the consumer did not pay the debt under these circumstances; that's why he has no actual damages here. That raises a serious question about whether he has standing to even complain about this practice, since it's not the practice under which the debt was collected and since, as I understand it, nothing communicated to him

suggested that he was going to have to pay more because this had reached the stage where NAN had to become involved.

So the only question for this court is whether any fact finder could say that the collection of this amount was either not expressly authorized by the agreement or not permitted by law.

If it was either, under the Federal Debt Collection Practices Act, it could not be the basis for a lawsuit. The debt agreement expressly provides that if, indeed, a debt has to be collected through litigation attorneys - - and that is what happened here - - that the consumer can be liable not only for the debt but for reasonable attorney's fees.

If the Upton Cohen firm sought to collect 20 percent of this debt as it's fee, $322.80 would have been the amount. This Court is familiar with attorney's fees sought in a host of contexts, many of them involving not much more than writing a few letters and trying to prompt an adversary to take action before a trail is actually begun.

I can't imagine anything that a lawyer does not generating at least 322 dollars in fees. So I cannot say that that amount was excessive or unreasonable given what went on here, the sending of a few letters or, therefore, that Upton Cohen's alleged sharing of part of that fee, some 40 dollars, with the network that referred them to the client, was contrary to the express authorization of the agreement to also be liable for attorney's fees here.

The argument has been made, Oh, no, these are not attorney's fees, these are referral fees, and the consumer should have known that. The court is not persuaded by this.

If there is any problem in this referral argument, it is properly addressed not by a jury awarding statutory fees or attorney's fees in a federal action for fair debt collection practice, but by the disciplinary committee of the New York State Supreme Court of Appeals.

If that is the route the parties want to go, that's outside this court's jurisdiction, but this is simply not a case in which anything involving NAN and Upton Cohen violates the federal Debt Collection Practices Act so as to give rise to a cause of action by Mr. Miller.

The motion to grant judgment in favor of the defendant's is granted in all respects. Thank you all very much.

MR. LANGONE: May I ask one question about the validation notice? Are you granting the summary judgment or ruling under 12(b)(6)?

On the other it's clear summary judgment, but for the purposes of the record, you holding on the validation notice, is that a summary judgment ruling or we don't state a claim?

THE COURT: On that there are no outside facts relied on, unless you consider the validation notice itself and the letter outside, but you attached that to the complaint, so it can fairly be viewed a part

of the complaint and therefore can be viewed as a motion to dismiss.

But, of course, I have to be candid with the parties. In reading these, I read all of the papers that were submitted by both sides.

Thank you very much.

* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of April, two thousand three.

ARTHUR MILLER, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v. Docket No. 02-7017

WOLPOFF & ABRAMSON, L.L.P.,
UPTON, COHEN & SLAMOWITZ,
NATIONAL ATTORNEY NETWORK, INC.,
successor to Wallace & de Mayo, a partnership and wholly- owned subsidiary of
TSYS Total Debt Management, Inc., individually and as joint venturers and co-conspirators with each other,
Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees Wolpoff & Abramson and Upton, Cohen & Slamowitz.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
NO.
CLASS ACTION

Arthur Miller,
on behalf of himself
and all others similarly situated,
Plaintiffs,

vs.

Wolpoff& Abramson, L.L.P., Upton, Cohen & Slarnowitz, and National Attorney Network, Inc., successor to Wallace & de Mayo, a partnership, and a wholly-owned subsidiary of TSYS Total Debt Management, Inc., individually and as joint venturers and co-conspirators with each other,

Defendants.

COMPLAINT

Introduction

1. Arthur Miller brings this action against Defendants, Wolpoff & Abramson, L.L.P., ("Wolpoff'), Upton, Cohen & Slamowitz, ("TJC&S"), and the National Attorney Network, Inc., successor Wallace & de Mayo, a partnership, and a wholly-owned subsidiary of TSYS Total Debt Management, Inc. ("NAN"), individually arid as joint venturers and co-conspirators for theft unfair, deceptive debt collection practices in violation of the Fair Debt Collection

Practices Act, 15 U.S.C. § 1692, et seq. ("FDCPA"), and their illegal practices of splitting fees with non-attorneys.

Parties

2. Arthur Miller is a citizen of the State of New York who resides within Flushing, New York.

3. Arthur Miller is a "consumer" as that term is defined by Section 1692(a)(3) of the FDCPA, in that the alleged debt that Wolpoff sought to collect from him is a consumer debt, incurred by Arthur Miller for personal purposes and purportedly owed to Lord & Taylor.

4. Wolpoff represents that it is comprised of "Attorneys in the Practice of Debt Collection" and that it is "A National Attorney Network Finn." Wolpoff represents that it is "a law firm that specializes in national debt collections" and that it is comprised of "attorneys in the practice of national debt collection." Therefore, Wolpoff is a "debt collector" as that term is defined by the FDCPA, 15 U.S.C. § 1692(a)(6).

5. Defendant Wolpoff has its principal place of business located at 7272 Wisconsin Avenue, 4th Floor, Bethesda, Maryland 208 14-4838. Wolpoff creates and conveys the impression that it is licensed to handle collection recovery in all 50 states of the United States.

6. Defendant Wolpoff is a "Member Firm" of NAN. Wolpoff is a "core member" of NAN.

7. Defendant UC&S is a "debt collector" as that term is defined by the FDCPA, 15 U.S.C. § 1692(a)(6).

8. Defendant UC&S's principal place of business is located at 485 Underhill Boulevard, Syosset, New York 11791-9030.

9. Defendant UC&S is a "Member Firm" of NAN.

10. Defendant NAN is a for-profit, non-professional corporation organized under the laws of the State of Georgia.

11. Although NAN is not a professional corporation nor is it a law firm, NAN does business in the State of New York and in all fifty states throughout the United States through its Member Firms, or as it refers to them, "Member Firm Offices."

Jurisdiction and Venue

12. This Court has Federal question jurisdiction under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.

13. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), as the acts and transactions that give rise to this action occurred, in substantial part, in this district. Venue is also proper in this district since, the parties can be found, have agents and/or transact business in this District.

The Defendants' Joint Venture and Civil Conspiracy

14. Wolpoff, UC&S, and NAN each were engaged in an enterprise for profit of consumer debt collection accounts with each other and illegally splitting the profits from the collection of those consumer accounts.

15. Wolpoff, UC&S, and NAN each contributed property, financing, skill, knowledge or effort to the task of collecting consumer accounts as described in this complaint.

16. Wolpoff, UC&S, and NAN each have some degree of joint management control over the venture in that NAN procedures and guidelines are used, Wolpoff was a founding "member firm" of NAN, and UC&S exercised some discretion or control over the means by which they filed the lawsuit against the Plaintiff

17. Wolpoff, UC&S, arid NAN each share both profits and losses, in that each of them stand to share in the attorney's fees realized from the collection of accounts submitted through the NAN network.

18. Wolpoff, UC&S, and NAN each conspired with one another to share fees on the collection of consumer accounts with a non-attorney.

19. Wolpoff, UC&S, and NAN each intentionally committed an overt act in the furtherance of this conspiracy in that Mr. Miller's account was forwarded through the NAN network from one NAN

Member Firm, Wolpoff, to another NAN Member Firm, UC&S, which accepted the account under the NAN guidelines.

20. By virtue of the above acts of Wolpoff, UC&S, and NAN, the Plaintiff and other consumers were injured in that they had collection actions brought against them seeking amounts which would ultimately be shared with a non-attorney. Moreover, a non-attorney helped direct or control the collection of an alleged debt in a way that violated the FDCPA, and Wolpoff and UC&S relegated such control to a non-attorney.

The Travels of Mr. Miller's Account

21. On information and belief, sometime in January of 2000, on a date better known by Defendants, NAN, either directly or through one of its Member Firms, received electronic information on a collection account for an alleged debt owed to Lord & Taylor by Plaintiff, Arthur Miller.

22. The debt that Plaintiff allegedly owed to Lord & Taylor was incurred for personal, family-or household purposes and therefore, was a consumer debt.

23. The minimum information required by NAN and its members to begin collection proceedings is the alleged debtor's name, last known address, and balance of the account. So at least that much information about Mr. Miller was provided to NAN.

24. On information and belief, Arthur Miller's account was placed in the NAN national centralized database, which is networked to each of the NAN Member law firms using "interactive groupware." Mr. Miller's account information became accessible to each of the NAN Member Firms through NAN's database, which ensures seamless communication between the clients, attorneys and the network. In this way the client/creditor can communicate with all Member Firms of NAN about an account.

25. From the NAN database, Mr. Miller's account was electronically distributed to Wolpoff, a NAN Member Firm, for collection action. According to NAN, generally, the only account information electronically transmitted to a Member Firm's computer from the NAN computer is the name of the alleged debtor, the last known address, the amount of the debt, the account number, the name of the creditor, and some basic information on the activity of the debt.

26. Once assigned to the computer of a Member Firm, such as Wolpoff, by the NAN central database, NAN represents that Member Firms automatically generate a form collection letter within one business day from the date a Member Firm receives instructions from NAN to proceed with a collection action. In Mr. Miller's instance, a form collection letter was generated on or about February 25, 2000, a copy of which is attached as Exhibit A. On information and belief, the form of this letter was approved and authorized by NAN.

27. Defendants sought to collect a balance of $1,618.14 from Mr. Miller through the use of Exhibit A.

28. Exhibit A is a form collection letter that is used by Wolpoff for hundreds if not thousands of consumer accounts placed for collections with them and the NAN network.

29. Although Exhibit A claims to be from a lawyer, in that in the signature block it states *"Very truly yours, WOLPOFF & ABRAMSON, L.L.P.,"* in reality, the letter does not come from an attorney in any meaningful.

30. On information and belief, an attorney did not read Exhibit A before it was sent to the Plaintiff, as no signature is affixed to the letter. On information and belief, it is Wolpoff's practice not to have an attorney read form letters, such as Exhibit A, before they are mailed to consumers.

31. Exhibit A was the first collection letter mailed by NAN to Mr. Miller, through its Member Firm, Wolpoff.

32. Defendants violated the FDCPA by mailing collection letters, such as Exhibit A, because the letter was deceptive and confusing as seen from the perspective of the least sophisticated consumer.

33. Defendants, through their Member Firm, Wolpoff, sent another letter on or about April 26, 2000, a copy of which is attached as Exhibit B. On information and belief, the form of this letter was approved and authorized by NAN and Wolpoff.

34. Exhibit B is a form collection letter that is used by Wolpoff for hundreds if not thousands of consumer accounts placed for collections with it and the NAN network.

35. Although Exhibit B claims to be from a lawyer, in that in the signature block it states "*Very truly yours, WOLPOFF & ABRAMSON, L.L.P.*, in reality, the letter does not come from an attorney in any meaningful.

36. On information and belief, an attorney did not read Exhibit B before it was sent to the Plaintiff, as no signature is affixed to the letter. On information and belief, it is Wo[poff's practice not to have an attorney read form letters, such as Exhibit B, before they are mailed to consumers.

37. Defendants, through their Member Firm, Wolpoff, sent another letter on or about May 31, 2000, a copy of which is attached as Exhibit C. On information and belief, the form of this letter was approved and authorized by NAN.

38. Exhibit C is a form collection letter that is used by Wolpoff for hundreds if not thousands of consumer accounts placed for collections with them and the NAN network.

39. Although Exhibit C claims to be from a lawyer, in that in the signature block it states *"Very truly yours, WOLPOFF & ABRAMSON, L.L.P.,"* in reality, the letter does not come from an attorney in any meaningful.

40. On information and belief, an attorney did not read Exhibit B before it was sent to the Plaintiff, as no signature is affixed to the letter. On information and belief, it is Wolpoff's practice not to have an attorney read form letters, such as Exhibit C, before they are mailed to consumers.

41. When the collection actions of sending Exhibits A, B and C to Mr. Miller did not work, the account was reassigned along the NAN network to another Firm Member, UC&S.

42. According to NAN guidelines, UC&S would have been assigned Mr. Miller's account on or about July 17, 2000.

43. On information and belief, the only information sent to UC&S prior to July 18, 2000 in support of the debt allegedly owed by Mr. Miller, was Mr. Miller's name, last known address, account balance, the account number, the name of the creditor, and some basic information on the activity of the debt.

44. On or about July 18, 2000, NAN, through the use of UC&S's letterhead, sent Mr. Miller a collection letter, approved as to form by NAN, a copy of which is attached as Exhibit D.

45. Exhibit D is a form collection letter that is used by UC&S for hundreds, if not thousands, of consumer accounts placed for collections with them and the NAN network.

46. Defendants sought to collect an amount of $1,676.79 from Mr. Miller through the use of Exhibit D.

47. Exhibit D informed Mr. Miller that UC&S "has been forwarded" his account for collection and that Miller should contact their office to arrange for payment.

48. On August 25, 2000, UC&S filed a collection action against Mr. Millet using a "verified complaint," a copy of which is attached as Exhibit E.

49. The Verified Complaint sought a "balance of $1,618.14" from Mr. Miller.

50. The Verified Complaint sought attorney's fees of exactly 20% of the principal balance sought for collection, or $323.63.

51. Based upon the Verified Complaint attached as Exhibit E, Mitchell Slamowitz claims that he has personal knowledge that Mr. Miller and the May National Bank of Ohio, d/b/a Lord & Taylor, entered into a credit card agreement.

52. Mitchell Slamowitz also claims the May National Bank of Ohio d/b/a Lord & Taylor has duly performed all conditions on its part under the credit card agreement.

53. On information and belief, as of the date that Exhibit E was filed, UC&S did not possess a copy of the credit card agreement between Mr. Miller and May National Bank of Ohio, d/b/a Lord & Taylor.

54. On information and belief, as of the date that Exhibit E was filed, UC&S did not possess a copy of the accounting of the credits and charges of an account between Mr. Millers and May National Bank of Ohio, d/b/a Lord & Taylor.

55. On information and belief, as of the date that Exhibit E was filed, UC&S did not possess a copy of any agreement between Mr. Miller and May National Bank of Ohio, d/b/a Lord & Taylor, that authorized the assessment of attorneys fees in the amount of 20% of the amount of the alleged debt.

COUNT I
Violations of the Fair Debt Collection Practices Act Brought by Plaintiff individually and on behalf of Class A

56. Plaintiff incorporates paragraphs 1-55 as if set forth fully into this Count.

57. This Count is brought on behalf of Arthur Miller and the members of a Class, Class A.

58. Class A consists of all consumers nationwide who were sent: (a) a letter bearing Wolpoff's letterhead: (b) in identical or similar form to the letter sent to the Plaintiff as exhibit A; (c) within one year of the date of this action; and (d) the collection letter was not returned by the postal service as undelivered.

59. Questions of fact and law common to all members of Class A predominate over those particular to individual members of the class. These common questions include:

a) Whether Wolpoff violated Sections 1692e, 1692e(3) and 1692e(10) of the FDCPA by falsely representing that Exhibit A meaningfully came from an attorney;

b) Whether Wolpoff violated Section 1692e(10) of the FDCPA by engaging in a deceptive practice of using false representations and deceptive conduct to collect consumer debts through the use of Exhibit A;

c) Whether NAN violated Section 1692e(14) of the FDCPA by using the business name of"Wolpoff & Abramson, L.L.P." for its collection activities;

d) Whether Wolpoff violated Sections 1692f and 1692f(1) of the FDCPA by attempting to collect a fee which it was attempting to split with NAN in violation of the applicable code of professional conduct, and criminal and civil codes regarding fee splitting; and

e) Whether Wolpoff violated Section 1692g of the FDCPA through its use of Exhibit A in that the letter confuses the validation rights of the consumer as seen from the perspective of the least sophisticated consumer.

60. The only individual issue is the identification of the consumers who received the letters, (i.e. the class members), a matter capable of ministerial determination from the records of Defendants.

61. Plaintiff will fairly and adequately protect the interests of Class A because his are based on the same facts and legal theories. Plaintiff does not have any interests antagonistic to those of the members of Class A.

62. Plaintiff and his counsel will fairly and adequately represent the interests of the members of Class A. Plaintiff and his counsel will vigorously pursue this matter.

63. On information and belief, Class A is so numerous that joinder of all members is impracticable.

64. Certification of Class A pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure is the appropriate means of resolving this controversy. Congress specifically envisions class actions as a principal means of enforcing the FDCPA. 15 U.S.C. 1692(k). In the absence of a class action, a failure of justice will result. Prosecution of separate actions by

individual members of the class would create the risk of inconsistent or varying adjudications resulting in the establishment of inconsistent or varying standards for the parties and would be against the interest of judicial economy.

65. Collection letters, such as those sent by Defendant, are to be evaluated by the objective standard of the hypothetical "least sophisticated Consumer."

Deceptively implying there was a meaningful review by an Attorney

66. Wolpoff fails to perform a meaningful review of consumer accounts prior to sending a consumer a collection letter.

67. Section 1692e of the Fair Debt Collection Practices Act provides, in relevant part.

> *A debt collector may not use any false, deceptive, or misleading, representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section . . .*
>
> * * *
>
> *(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.*
>
> * * *
>
> *(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.*

68. On information and belief, Wolpoff sends out thousands, if not tens of thousands, of letters under its attorney letterhead. According to NAN, NAN or the client must approve the letter. On information and belief, employees of NAN reviewed and approved the form of Exhibit A.

69. On information and belief, Wolpoff uses a mechanized, computer-driven process to send these letters, and most variable information (such as the name of the creditor, the alleged amount due, and the name of the consumer) is inserted into pre-defined fields by a word processor or other computer-driven document-assembly software.

70. On information and belief, the information fed into the pre-defined fields is derived from a magnetic tape or other electronic-transfer means without the need for an employee of Wolpoff to actually manually enter the data.

71. Plaintiff is informed and believes, and on that basis alleges, that the information to be inserted in these fields is sent to Wolpoff *en masse,* as electronically-stored information, via modem or other computer-readable format. The letters are then created directly from this electronically-stored information.

72. On information and belief, no attorney reviews or authorizes any particular letter before it is sent. Rather, the only attorney involvement is to review the form of letter sent and to define some general parameters as to the intended recipients. Then, the process is delegated to a computer and clerical

workers. This allegation is bolstered by the fact that the letters sent to consumers do not contain a signature.

73. Defendants Wolpoff and NAN violated Sections 1692e, l692e(3) and 1692e(l0) of the FDCPA by sending collection letters identical or similar to the one sent to Mr. Miller in the form of Exhibit A. The letter deceptively purports to be "from an attorney" when in fact the letter, which is on attorney-letterhead, is not from an attorney in any meaningful sense. No attorney reviews the file, makes determinations about the legal validity of the debt or interacts with the consumer before the letters are sent.

74. Further proof that the collection letters sent on Wolpoff's attorney letterhead are not "from an attorney" in any meaningful sense is that neither NAN nor Wolpoff are licensed to practice law in New York. Yet, NAN and Wolpoff masquerade as a "law firm" by using the power and leverage of Wolpoff' s attorney letterhead to collect debts from consumers.

75. Through the use of collection letters such as the one sent to Plaintiff on "attorney letterhead," NAN and Wolpoff deceptively imply to the "least sophisticated consumer" that an attorney is meaningfully involved in collecting on his account.

76. Because NAN and Wolpoff violated the Fair Debt Collection Practices Act, Arthur Miller is entitled to damages in accordance with the FDCPA.

Deceptive and incomplete statement of the consumer's rights

77. Exhibit A is confusing on its face in violation of Section 1692e(10) in that the "IMPORTANT NOTICE" on the reverse side of the form letter says in relevant part *"you are entitled to certain information that sets forth your rights and our obligations under the law."* (Emphasis added). This statement implies to the least sophisticated consumer that the letter sets forth the consumer's complete rights. However, the notice does not inform consumers of their complete set of rights or warn the consumer that the notice contains only a partial list of the consumers rights as set forth by the FDCPA and applicable state laws. (In Mr. Miller's instance, the warnings required by the City and State of New York were omitted.)

78. Because Defendant violated the Fair Debt Collection Practices Act, Arthur Miller is entitled to damages in accordance with the FDCPA.

Misrepresentation of who is attempting to collect the debt

79. In essence, accounts placed with NAN are actually being collected by NAN through the computer-automated practice of sending debt collection letters on its NAN Member Firm's letterhead. An account placed with NAN is assigned to a Member Firm for collection.

80. According to NAN representations, the account has an initial debt collection letter automatically generated. Therefore, the collection activity is commenced by NAN and the member firm participates in this structure.

81. Commencing collection activity using a form collection letter containing business name of "Wolpoff & Abramson, L.L.P." for NAN's collection activities is a deceptive practice that violates Section 1692e(14) of the FDCPA.

82. NAN acting as the collection agent and controlling force of the collection proceeding is bolstered by the practice of NAN Firm Members splitting a fee with NAN, in violation of the New York State Code of Professional Responsibility (the "Disciplinary Rules") and the Model Rules of Professional Conduct and therefore constitutes a false, debt under Sections 1692e.

Splitting fees with NAN, a non-attorney, is void and unenforceable as an illegal agreement

83. NAN splits the contingent fees with its NAN Member Firms, such as Wolpoff and UC&S.

84. New York State Judiciary Law § 491 provides that:

> § 491. Sharing of compensation by attorneys prohibited

> 1. It shall be unlawful for any person, partnership, corporation, or association to divide with or receive from, or to agree to divide with or receive from, any attorney-at-law or group of attorneys-at-law, whether practicing in this state or elsewhere, either before or after action brought, any portion of any fee or compensation, charged or received by such attorney-at-law or any valuable consideration or reward, as an inducement for placing, or in consideration of having placed, in the hands of such attorney-at-law, or in the hands of another person, a claim or demand of any kind for the purpose of collecting such claim, or bringing an action thereon, or of representing claimant in the pursuit of any civil remedy for the recovery thereof. But this section does not apply to an agreement between attorneys and counsellors-at-law to divide between themselves the compensation to be received.
>
> 2. Any person violating any of the provisions of this section is guilty of a misdemeanor.

85. Because the fee split is illegal, it is a void agreement and the fee portion given to NAN should be refunded to each consumer from which it was collected during the class period.

86. Wolpoff, UC&S and NAN violated Sections 1692f and 1692f(l) of the FDCPA by attempting to collect a fee which they agreed to split with NAN, a non-attorney, in violation of the applicable code of professional conduct.

87. Because Defendants jointly and severally violated the Fair Debt Collection Practices Act, Arthur Miller is entitled to damages in accordance with the FDCPA.

Confusion of the validation notice under Section 1692g of the FDCPA

88. Exhibit A is confusing on its face as it confounds the notice required under Section 1692g of the FDCPA.

89. Section 1692g of the FDCPA requires that a debt collector include a validation notice with, or within five (5) days of, the initial communication from the debt collector to the consumer. This notice is intended to advise the consumer as to certain federal rights in connection with a procedure under which a consumer may dispute a debt, request verification of a debt, or obtain certain information about the creditor.

90. Under federal law, this validation notice must be effectively communicated, and may not be overshadowed, confounded or diluted as seen from the perspective of the "least sophisticated consumer."

91. Defendants violated Section 1692g of the FDCPA by mailing collection letters, such Exhibit A, which did not effectively communicate the validation notice because the instructions on the face of the letter are confusing. The letter states in relevant part "after you have read the important notice on the reverse side of this letter, if appropriate please call our office to resolve this matter." This is misleading in that calling

will not preserve the consumer's rights to dispute the debt or obtain a validation of the debt under Section 1692g of the FDCPA.

92. Because Defendants jointly and severally violated the Fair Debt Collection Practices Act, Arthur Miller is entitled to damages in accordance with the FDCPA.

WHEREFORE, Arthur Miller asks that this Court of the members of Class A and against NAN, Wolpoff & Abramson, L.L.P., and UC&S, each individually and jointly and severally as joint venturers, and award damages as follows:

(a) Actual damages;

(b) Statutory damages provided under the FDCPA, 15 U.S.C. 1692(k);

(c) Attorney fees, litigation expenses and costs incurred in bringing this action; and

(d) Any other relief that this Court deems appropriate and just under the circumstances.

COUNT II
Violations of the Fair Debt Collection Practices Act Brought by Plaintiff individually and on behalf of Class B

93. Plaintiff incorporates paragraphs 1-55 as if set forth fully into this Count.

94. This Count is brought on behalf of Arthur Miller and the members of Class B.

95. Class B consists of all consumers nationwide who were sent: (a) a letter bearing Wolpoff's letterhead; (b) in identical or similar form to the letter sent to the Plaintiff as Exhibit B; (c) within one year of the date of this action; and (d) the collection letter was not returned by the postal service as undelivered.

96. Questions of fact and law common to all members of Class B predominate over those peculiar to individual members of the class. These common questions include:

a) Whether Wolpoff violated Sections 1692e, 1692e(3) and 1692e(10) of the FDCPA by falsely representing that Exhibit B meaningfully came from an attorney;

b) Whether NAN violated Sections 1692e, 1692e(3), 1692e(10) and 1692e(14) of the FDCPA by collecting a debt without disclosing its identity in Exhibit B;

c) Whether NAN violated Section 1692e([4) of the FDCPA by using the business name of "Wolpoff & Abramson, L.L.P." for its collection activities.

d) Whether Wolpoff violated Sections 1692f and 1692f(l) of the FDCPA by attempting to collect a fee which it was attempting to split with NAN in violation of the applicable code of professional conduct; and

Misrepresentation of who is attempting to collect the debt

97. In essence, accounts placed with NAN are actually being collected by NAN through the computer-automated practice of sending debt collection letters on its NAN Member Firm's letterhead. An account placed with NAN is assigned to a Member Firm for collection.

98. According to NAN representations, the account has an initial debt collection letter automatically generated. Therefore, the collection activity is commenced by NAN and the member firm participates in this structure.

99. Commencing collection activity using a form collection letter identical or similar to Exhibit B containing business name of "Wolpoff & Abramson, L.L.P." for NAN's collection activities is a deceptive practice that violates Section 1692e(14) of the FDCPA.

100. NAN acting as the collection agent and controlling force of the collection proceeding is bolstered by the practice of NAN Firm Members splitting a fee with NAN, in violation of the New York Code of ethics and the Model Rules of Professional conduct and therefore constitutes a false, deceptive, or misleading representation or means in connection with the collection of any debt under Sections 1692e.

Splitting fees with NAN, a non-attorney, is void and unenforceable as an illegal agreement

101. NAN splits the contingent fees with its NAN Member Firms, such as Wolpoff and UC&S.

102. New York State Judiciary Law § 491 provides that:

> § 491. Sharing of compensation by attorneys prohibited
>
> 1. It shall be unlawful for any person, partnership, corporation, or association to divide with or receive from, or to agree to divide with or receive from, any attorney-at-law or group of attorneys-at-law, whether practicing in this state or elsewhere, either before or after action brought, any portion of any fee, or compensation, charged or received by such attorney- at-law or any valuable consideration or reward, as an inducement for placing, or in consideration of having placed, in the hands of such attorney-at-law, or in the hands of another person, a claim or demand of any kind for the

purpose of collecting such claim, or bringing an action thereon, or of representing claimant in the pursuit of any civil remedy for the recovery thereof. But this section does not apply to an agreement between attorneys and counsellors-at-law to divide between themselves the compensation to be received.

2. Any person violating any of the provisions of this section is guilty of a misdemeanor.

103. Because the fee split is illegal, it is a void agreement and the fee portion given to NAN should be refunded to each consumer from which it was collected during the class period.

104. Wolpoff, UC&S and NAN violated Sections 1692f and 1692f(1) of the FDCPA by attempting to collect a fee which they agreed to split with NAN, a non-attorney, in violation of the applicable code of professional conduct.

105. Because Defendants jointly and severally violated the Fair Debt Collection Practices Act, Arthur Miller is entitled to damages in accordance with the FDCPA.

WHEREFORE, Arthur Miller ask that this Court enter judgment in Arthur Miller's favor and on behalf of the members of Class B and against NAN, Wolpoff & Abramson, L.L.P., and UC&S, each individually and jointly and severally as joint venturers, and award damages as follows:

(a) Actual damages;

(b) Statutory damages provided under the FDCPA, 15 U.S.C. 1692(k);

(c) Attorney fees, litigation expenses and costs incurred in bringing this action; and

(d) Any other relief that this Court deems appropriate and just under the circumstances.

COUNT III
Violations of the Fair Debt Collection Practices Act Brought by Plaintiff individually and on behalf of Class C

106. Plaintiff incorporates paragraphs 1-55 as if set forth fully into this Count.

107. This Count is brought on behalf of Arthur Miller and the members of Class C.

108. Class C consists of all consumers nationwide who were sent: (a) a letter bearing Wolpoff's letterhead (b) in identical or similar form to the letter sent to the Plaintiff as Exhibit C; (c) within one year of the date of this action; and (d) the collection letter was not returned by the postal service as undelivered.

109. Questions of fact and law common to all members of Class C predominate over those peculiar to individual members of the class. These common questions include:

a) Whether Wolpoff violated Sections 1692e, 1692e(3) and 1692e(10) of the FDCPA by falsely representing that Exhibit C meaningfully came from an attorney;

b) Whether NAN violated Section 1692e(14) of the FDCPA by using the business name of "Wolpoff & Abramson, L.L.P." for its collection activities.

c) Whether Wolpoff violated Sections 1692f and 1692f(1) of the FDCPA by attempting to collect a fee which it was attempting to split with NAN in violation of the applicable code of professional conduct.

Misrepresentation of who is attempting to collect the debt

110. In essence, accounts placed with NAN are actually being collected by NAN through the computer-automated practice of sending debt collection letters on its NAN Member Firm's letterhead. An account placed with NAN is assigned to a Member Firm for collection.

111. According to NAN representations, the account has an initial debt collection letter automatically generated. Therefore, the collection activity is commenced by NAN and the member firm participates in this structure.

112. Commencing collection activity using a form collection letter identical or similar to Exhibit C containing business name of "Wolpoff & Abramson, L.L.P." for NAN's collection activities is a deceptive practice that violates Section 1692e(14) of the FDCPA.

113. NAN acting as the collection agent and controlling force of the collection proceeding is bolstered by the practice of NAN Firm Members splitting a fee with NAN, in violation of the New York Code of ethics and the Model Rules of Professional conduct and therefore constitutes a false, deceptive, or misleading representation or means in connection with the collection of any debt under Sections 1692e.

Splitting fees with NAN, a non-attorney, is void and unenforceable as an illegal agreement

114. NAN splits the contingent fees with its NAN Member Firms, such as Wolpoff and UC&S.

115. New York State Judiciary Law § provides that:

§ 491. Sharing of compensation by attorneys prohibited

> 1. It shall be unlawful for any person, partnership, corporation, or association to divide with or receive from, or to agree to divide with or receive from, any attorney-at-law or group of attorneys-at-law, whether practicing in this state or elsewhere, either before or after action brought, any portion of any fee or compensation, charged or received by such attorney- at-law or any valuable consideration or reward, as an inducement for placing, or in consideration of having placed, in the hands of such attorney-at-law, or in the hands of another person, a claim or demand of any kind for the purpose of collecting such claim, or bringing an action thereon, or of representing claimant in the pursuit of any civil remedy for the recovery thereof. But this section does not apply to an agreement between attorneys and counsellors-at-law to divide between themselves the compensation to be received.
>
> 2. Any person violating any of the provisions of this section is guilty of a misdemeanor.

116. Because the fee split is illegal, it is a void agreement and the fee portion given to NAN should be refunded to each consumer from which it was collected during the class period.

117. Wolpoff, UC&S and NAN violated Sections 1692f and 1692f(1) of the FDCPA by attempting to collect a fee which they agreed to split with NAN, a non-attorney, in violation of the applicable code of professional conduct.

118. Because Defendants jointly and severally violated the Fair Debt Collection Practices Act, Arthur Miller is entitled to damages in accordance with the FDCPA.

WHEREFORE, Arthur Miller ask that this Court enter judgment in Arthur Miller's favor and on behalf of the members of Class C and against NAN, Wolpoff & Abramson, L.L.P., and UC&S, each individually and jointly and severally as joint venturers, and award damages as follows:

(a) Actual damages;

(b) Statutory damages provided under the FDCPA, 15 U.S.C. 1692(k);

(c) Attorney fees, litigation expenses and costs incurred in bringing this action; and

(d) Any other relief that this Court deems appropriate and just under the circumstances.

COUNT IV
Violations of the Fair Debt Collection Practices Act Brought by Plaintiff individually and on behalf of Class D

119. Plaintiff incorporates paragraphs 1-55 as if set forth fully into this Count.

120. This Count is brought on behalf of Arthur Miller and the members of a Class, Class D.

121. Class D consists of all consumers nationwide who were sent (a) a letter bearing UC&S letterhead (b) in identical or similar form to the letter sent to the Plaintiff as Exhibit D; (c) within one year of the date of this action; and (d) the collection letter was not returned by the postal service as undelivered.

122. Questions of fact and law common to all members of Class D predominate over those peculiar to individual members of the class. These common questions include:

a) Whether Wolpoff violated Sections 1692e, 1692e(3) and 1 692e(10) of the FDCPA by falsely representing that Exhibit D meaningfully came from an attorney;

b) Whether NAN violated Section 1692e(14) of the FDCPA by using the business name of "Upton Cohen & Slamowitz" for its collection activities.

c) Whether UC&S violated Sections 1692f and 1692f(1) of the FDCPA by attempting to collect a fee which it was attempting to split with NAN in violation of the applicable code of professional conduct.

Misrepresentation of who is attempting to collect the debt

123. In essence, accounts placed with NAN are actually being collected by NAN through the computer-automated practice of sending debt collection letters on its NAN Member Firm's letterhead. An account placed with NAN is assigned to a Member Firm for collection.

124. According to NAN representations, the account has an initial debt collection letter automatically generated. Therefore, the collection activity is commenced by NAN and the member firm participates in this structure.

125. Commencing collection activity using a form collection letter identical or similar to Exhibit D containing business name of "Wolpoff & Abramson, L.L.P." for NAN's collection activities is a deceptive practice that violates Section 1692e(14) of the FDCPA.

126. NAN acting as the collection agent and controlling force of the collection proceeding is bolstered by the practice of NAN Firm Members

splitting a fee with NAN, in violation of the New York Code of ethics and the Model Rules of Professional conduct and therefore constitutes a false, deceptive, or misleading representation or means in connection with the collection of any debt under Sections 1692e.

Splitting fees with NAN, a non-attorney, is void and unenforceable as an illegal agreement

127. NAN splits the contingent fees with its NAN Member Firms, such as Wolpoff and UC&S.

128. New York State Judiciary Law § 491 provides that:

> § 491. Sharing of compensation by attorneys prohibited
>
> 1. It shall be unlawful for any person, partnership, corporation, or association to divide with or receive from, or to agree to divide with or receive from, any attorney-at-law or group of attorneys-at-law, whether practicing in this state or elsewhere, either before or after action brought, any portion of any fee or compensation, charged or received by such attorney- at-law or any valuable consideration or reward, as an inducement for placing, or in consideration of having placed, in the hands of such attorney-at-law, or in the hands of another person, a claim or demand of any kind for the purpose of collecting such claim, or bringing an action thereon, or of representing claimant in the pursuit of any civil remedy for the recovery

thereof. But this section does not apply to an agreement between attorneys and counsellors-at-law to divide between themselves the compensation to be received.

2. Any person violating any of the provisions of this section is guilty of a misdemeanor.

129. Because the fee split is illegal, it is a void agreement and the fee portion given to NAN should be refunded to each consumer from which it was collected during the class period.

130. Wolpoff, UC&S and NAN violated Sections 1692f and 1692f(1) of the FDCPA by attempting to collect a fee which they agreed to split with NAN, a non-attorney, in violation of the applicable code of professional conduct.

131. Because Defendants jointly and severally violated the Fair Debt Collection Practices Act, Arthur Miller is entitled to damages in accordance with the FDCPA.

WHEREFORE, Arthur Miller ask that this Court enter judgment in Arthur Miller's favor and on behalf of the members of Class D and against NAN, Wolpoff & Abramson, L.L.P., and UC&S, each individually and jointly and severally as joint venturers, and award damages as follows:

(a) Actual damages;

(b) Statutory damages provided under the FDCPA, 15 U.S.C. 1692(k);

(c) Attorney fees, litigation expenses and costs incurred in bringing this action; and

(d) Any other relief that this Court deems appropriate and just under the circumstances.

COUNT V
Violations of the Fair Debt Collection Practices Act Brought by Plaintiff individually and on behalf of Class E

132. Plaintiff incorporates paragraphs 1-55 as if set forth fully into this Count.

133. This Count is brought on behalf of Arthur Miller and the members of a Class, Class E.

134. Class E consists of all consumers nationwide who were (a) sued using a verified complaint (b) in a form identical or similar form to the letter sent to the Plaintiff as Exhibit E; (c) within one year of the date of this action; and (d) the complaint sought attorneys fees.

135. Questions of fact and law common to all members of Class E predominate over those peculiar to individual members of the class. These common questions include:

a) Whether UC&S violated Sections' 1692f and 1692f(1) of the FDCPA by attempting to collect a fee which it was attempting to split with NAN in violation of the applicable code of professional conduct; and

b) Whether UC&S violated the FDCPA by seeking attorney fees of 20% to which it was not entitled.

Filing a Verified Complaint with an inadequate review

136. UC&S was forwarded Mr. Miller's account over electronic medium using NAN guidelines. On information and belief, only basic information is provided by NAN.

137. No documents were attached to the complaint field by UC&S further bolstering the fact that defendants did not possess a copy of the contract authorizing the assessment of fees at the time they asked for them in the complaint.

138. UC&S obtained a default judgment against Mr. Miller. At the time of the default, UC&S waived the right to seek their attorneys' fees in order to avoid having to show an agreement for their assessment to the State Court.

139. On information and belief, it is a practice of UC&S to seek attorneys fees in its form complaints filed on claims submitted by NAN and then at the time of a default judgment to waive those fees in order to avoid having to prove the fees are available and that they are justified based upon the work performed.

140. Wolpoff, UC&S arid NAN violated Sections 1692f and 1692f(1) of the FDCPA by attempting to collect a fee to which they had no evidence of at the time they sought it.

Splitting fees with NAN, a non-attorney, is void and unenforceable as an illegal agreement

141. NAN splits the contingent fees with its NAN Member Firms, such as Wolpoff and UC&S.

142. New York State Judiciary Law § 491 provides that:

> § 491. Sharing of compensation by attorneys prohibited
>
> 1. It shall be unlawful for any person, partnership, corporation, or association to divide with or receive from, or to agree to divide with or receive from, any attorney-at-law or group of attorneys-at-law, whether practicing in this state or elsewhere, either before or after action brought, any portion of any fee or compensation, charged or received by such attorney- at-law or any valuable consideration or reward, as an inducement for placing, or in

consideration of having placed, in the hands of such attorney-at-law, or in the hands of another person, a claim or demand of any kind for the purpose of collecting such claim, or bringing an action thereon, or of representing claimant in the pursuit of any civil remedy for the recovery thereof. But this section does not apply to an agreement between attorneys and counsellors-at-law to divide between themselves the compensation to be received.

2. Any person violating any of the provisions of this section is guilty of a misdemeanor.

143. Because the fee split is illegal, it is a void agreement and the fee portion given to NAN should be refunded to each consumer from which it was collected during the class period.

144. Wolpoff, UC&S and NAN violated Sections 1692f and 1692f(1) of the FDCPA by attempting to collect a fee which they agreed to split with NAN, a non-attorney, in violation of the applicable code of professional conduct.

145. Because Defendants jointly and severally violated the Fair Debt Collection Practices Act, Arthur Miller is entitled to damages in accordance with the FDCPA.

WHEREFORE, Arthur Miller ask that this Court enter judgment in Arthur Miller's favor and on behalf of the members of Class E and against NAN, Wolpoff

& Abramson, L.L.P., and UC&S, each individually and jointly and severally as joint venturers, and award damages as follows:

(a) Actual damages;

(b) Statutory damages provided under the FDCPA, 15 U.S.C. 1692(k);

(c) Attorney fees, litigation expenses and costs incurred, in bringing this action; and

(d) Any other relief that this Court deems appropriate and just under the circumstances.

PLAINTIFF DEMANDS TRIAL BY JURY

Dated: New York, New York
February 23, 2001

RESPECTFULLY SUBMITTED,
By: /s/Brian Bromberg
Brian Bromberg (BLB: 6264),
One of Plaintiffs' attorneys

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PRELIMINARY STATEMENT

Pursuant to Rules 35 of the Federal Rules of Appellate Procedure, Appellees, Wolpoff & Abramson, L.L.P., (W&A) and Upton, Cohen & Slamowitz, (UC&S) petition for a rehearing en banc of the decision of this Court dated February 25, 2003.

Appellees submit that rehearing en banc is appropriate in view of the exceptional importance of this decision and its significant impact on the practice of law by attorneys handling claims for consumer creditor clients. W&A and UC&S premise their rehearing petition on the following grounds: (1) the panel's decision exposes privileged attorney-client communications and materials protected by the attorney work product doctrine to discovery; (2) the panel's decision invades a power reserved to the states under the Tenth Amendment; (3) the panel's decision expands a prior ruling of this Court beyond the intent of the statute; and (4) the panel did not apply the correct case law issued by this circuit regarding applications for leave to conduct discovery.

The standards applied by the panel's decision allow any consumer debtor who is sued by attorney on behalf of a creditor client to state a cause of action under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692, et. seq. by merely alleging that the attorney has not reviewed enough materials from the client and has therefore falsely represented his or her status as an attorney in violation of 15 U.S.C. §1692e(3). The decision then subjects the attorney to discovery by the debtor's counsel on the nature and

extent of information provided by the creditor client to the attorney, even though information provided by a client to an attorney is protected by the attorney client privilege.

Further, the panel's decision imposes broad and unprecedented restrictions on the role of an attorney in representing a client. Under the panel's decision, an attorney can no longer handle a case for a client who merely tells the attorney ' that a debt is overdue". Slip Op. at 19. The attorney must jettison the role of zealous advocate and instead be placed in the defensive position of preventing an FDCPA lawsuit by making sure that the "information in the...file (is) adequate to make these kind of (legal) judgments." Slip. Op. at 20.

Under the panel's decision, even after the attorney reviews information provided by the client, the attorney's judgment as to what is needed to represent a client and/or to file a lawsuit is subject to an independent legal review by a Federal Court jury, who may determine, as a finding of fact, that the review by the attorney was not adequate to insure the attorney's meaningful review of the claim. ("A reasonable jury could conclude that W&A and UC&S lacked sufficient professional involvement with the...file that the letters could be said to come from an attorney"). Slip. Op. at 22. Moreover, there could be a variety of different jury verdicts involving this issue. This type of oversight of attorneys who handle claims and file suits on behalf of clients, as was done in this case, impermissibly oversteps Federal authority by imposing minimal standards on attorneys who are licensed by individual states to represent clients in

court proceedings, thereby intruding upon the regulation of the practice of law, a function reserved to the states and to their disciplinary authorities by the Tenth Amendment.

For these reasons, a rehearing en banc is appropriate.

ARGUMENT

A. THE PANEL'S DECISION EXPOSES ATTORNEY-CLIENT COMMUNICATIONS AND ATTORNEY WORK PRODUCT MATERIALS TO DISCOVERY.

The Panel's decision, while acknowledging that the debt collection letters from both W&A and UC&S were from law firms ("Although there is no dispute that W&A and UC&S are law firms, or that the letters sent by those firms were 'from' attorneys in the literal sense of the word...)(Slip Opinion at 12), held that Miller was entitled to invasive discovery to determine exactly what information was provided by Lord & Taylor to its attorneys. The panel opined that "the affidavits...lack sufficient detail to permit the district court or us to determine that their review [of the file provided by the attorneys' client] was sufficient..." (Slip Op. at19), held that the information provided by the attorneys in their affidavits was "conclusory" and "does not describe what information [the attorneys] reviewed to permit [them] to exercise [their] 'independent professional judgment" (Id. at 20) and stated that "we cannot conclude that the information in [W&A's and UC&S's] file was adequate..." (Id.). The panel concluded that the FDCPA plaintiff in this case

should have an "opportunity to investigate precisely what information the affidants reviewed, how much time was spent reviewing plaintiff's file, and whether any legal judgment was involved with the decision to send the letters and ultimately to initiate litigation..." Id. at 23.

The panel's rejection of summary judgment on the ground that a party opponent should be permitted to examine information presented to an attorney by a client for purposes of litigation and to explore the legal thoughts and judgments of the creditor's attorney is contrary to the longstanding doctrines of attorney-client privilege and attorney work-product doctrine. The panel's ruling is particularly troublesome given the fact that Lord & Taylor retained the two law firms for the purpose of filing suit against Miller and that Miller was actually sued on the underlying debt.

The Supreme Court has repeatedly held that information presented to attorneys by clients is sacred. "The attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981); *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888). The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice", Swidler & Berlin v. U.S., 449 U.S. 383, 118 S.Ct. 2081, 2084 (1998), and is so important that it even survives the death of the client.

In the seminal case of Upjohn Co. v. U.S., 101 S.Ct. 677, 684 (1981), the Supreme Court noted the paramount importance of this privilege. "[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Id. at 684. In that case, the Supreme Court held that attorney-client privilege was extended to communications between a corporate client and its counsel - even if the communications were made by low to mid-level employees. The Court noted that, "The client cannot be compelled to answer the question, 'What did you say or write to the attorney?'" Id. at 686. Yet, that is the precise question the panel has stated needs to be considered in this matter where the panel and the Appellants all concede that the letters sent to Miller came from attorneys retained by the creditor/client.

The panel suggests that Miller can obtain through discovery the precise information supplied by Lord & Taylor to its counsel for the purpose of commencing litigation against Miller for his unpaid debt. This is particularly egregious considering Miller was sued by the attorneys over the debt. Not only are the materials presented by Lord & Taylor to its attorneys privileged, but the manner in which the attorneys analyzed Lord & Taylor's claim against Miller is protected by the attorney work-product doctrine. As explained by the Supreme Court in Upjohn: "the notes and memoranda sought ... are

work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." Id. at 688.

The attorneys in the instant matter have been placed in an untenable position. They have been forced to present the minimum information required to establish the letters they sent to Miller "came from attorneys" by providing somewhat conclusory affidavits without disclosing client confidences or attorney work product. The FDCPA provision prohibiting the "false representation or implication that any individual is an attorney or that any communication is from an attorney" (15 U.S.C. §1692e) was designed to prevent collection agencies or creditors from masquerading as attorneys. It was not designed to allow a debtor to evaluate what information a client presented to real attorneys who ultimately litigated the collection case against him.

This circuit, like the Supreme Court, has been unwavering and emphatic in the protection of communications between an attorney and client. In In re: Dow Corning Corp., 261 F.3d 280 (2d Cir. 2001), this court warned the District Court to tread carefully when evaluating discovery seeking potentially privileged information:

> [C]ompelled disclosure of privileged attorney-client communications, absent waiver or an applicable exception, is contrary to well established precedent...the Shareholders fail to cite even a single case involving attorney-client privilege...(t)he absence of authority no doubt stems from the common sense observation that such a protective order is an inadequate surrogate for the privilege. If an adverse party is provided access to privileged material, then 'a pertinent aspect of confidentiality will be lost.' 'The privilege rests on the belief that in an adversary system, a client's full disclosure to an attorney is a necessary predicate to skillful advocacy and fully informed legal advice. The existence of the privilege thus allows attorneys to assure clients that any information given to their attorneys will remain confidential'."

Id. at 282. (internal citations omitted)

In the case at bar, the panel surmised about the nature of the "customer service notes" transmitted to Wolpoff & Abramson, L.L.P. from its client Lord & Taylor. The law firm, in defending the suit, made general references to information provided by its client to establish that the firm was, in fact, retained by Lord & Taylor and evaluated materials supplied by its client prior to sending a letter of representation to Miller. The firms, however, properly declined to provide details so that the communications transmitted to them in confidence by their client was protected.

The panel's holding that all information transmitted to Wolpoff & Abramson, L.L.P. by its client must be revealed to evaluate the extent of the lawyer's review of client materials is an extraordinary result which subjects all creditor's lawyers to disclosing client confidences merely to prove they have not falsely represented that they are attorneys, even when they litigate on behalf of a client. This is the exact scenario the Supreme Court and this Court have repeatedly held are unacceptable and represents an unwarranted intrusion into attorney confidences.

B. THE PANEL'S DECISION TRANSFORMED A FEDERAL STATUTE OUTLAWING ABUSIVE, DECEPTIVE AND MISLEADING DEBT COLLECTION PRACTICES BY ATTORNEYS COLLECTING CONSUMER DEBTS INTO A REGULATION GOVERNING THE PRACTICE OF LAW, A POWER RESERVED TO THE STATES BY THE TENTH AMENDMENT.

Although denying they were creating a standard of review, the panel's decision had the effect of promulgating minimum standards for the practice of law by attorneys representing clients in court proceedings. As a consequence, the decision operates as a Federal mandate regulating the practice of law, a power that is reserved to the states under the Tenth Amendment.

The principle that the power to regulate the practice law is one reserved to the states in our Federalist system has been specifically recognized and acknowledged by the Supreme Court. "Since the founding of the republic, the licensing and regulation

of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The states prescribe the qualifications for admission to practice and the standards of professional conduct." Leis v. Flynt, 439 U.S. 438,442 (1979) (emphasis added). The Supreme Court has also recognized that the limitations on federal power expressed in the Tenth Amendment should be considered in evaluating a regulation governing the practice of law. See, Sperry v. State of Florida, 373 U.S. 379, 83 S. Ct. 1322 (1963). In Sperry, the Court vacated an order by the Supreme Court of Florida enjoining an attorney registered with the United States Patent Office from holding himself out as an attorney in Tampa, Florida. The Court acknowledged the Tenth Amendment argument made by the State of Florida but had no reason to adopt the argument because of a specific congressional enactment regulating Patent Law practice in furtherance of the constitutional provision granting Congress the exclusive authority to regulate the issuance of Patents and Copyrights under Article 1, §8, United States Constitution.

The panel holds that it is not sufficient for a lawyer, who has been retained by a client in the traditional sense, as opposed to one who loans his letterhead to a collection agency or creditor, to accept a case merely because his client says that a debt is overdue. Slip Op. at 19. The panel further concludes that there is an ill-defined minimum amount of information that a client must provide a lawyer, beyond what was furnished in the law firms' affidavits filed in this case, before a lawyer is permitted to file a lawsuit for a client. However, the same attorney is

vested with complete authority under applicable state regulation and licensing statutes to file lawsuits for creditor clients and to obtain judgments on open accounts.

Under the panel's decision, a lawyer licensed by a state, who sends a pre-litigation demand, and then properly files a suit at a client's request, can nonetheless violate Federal law if the attorney did not review the ill-defined minimum standard of information required by the panel. The panel's decision therefore adds a Federal layer of regulation before a collection attorney may accept a case. In doing so, an impermissible Federal regulation has been added to the qualifications of a state licensed attorney. This result, based upon a law designed to cure deceptive and misleading collection practices, oversteps congressional authority and invades the right to regulate the practice of law, which is reserved to the states by the Tenth Amendment.

The power reserved to the states to regulate the practice of law, including the power to oversee attorneys handling all types of cases, including debt collection cases, is given full recognition by the federal courts. This power has been breached by the panel's decision. This decision expands the FDCPA by permitting federal courts to make factual determination as to what information must be provided to an attorney who represents a client and thereby establishes, for the first time, that attorneys who handle claims and/or file suit in state courts must follow a Federal guideline before accepting a consumer claim and before filing a lawsuit for the client based upon that claim.

As a result, this decision runs afoul of the Tenth Amendment. It is therefore imperative that this court consider, en banc, the exceptionally important question presented by the application of this court's decision to the power reserved to the states to regulate the practice of law.

C. THE PANEL'S DECISION ERRONEOUSLY EXPANDS THE MEANINGFUL INVOLVEMENT TEST UNDER 15 U.S.C.§ 1692E(3) AND IS CONTRARY TO THE PRIOR DECISION OF THIS COURT THAT ADOPTED THE STANDARD.

The Fair Debt Collection Practices Act, 15 U.S.C. §1692 et. seq., was enacted in "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. §1692(e). A provision in the original FDCPA, enacted in 1977, and applicable at that time only to debt collection agencies, prohibits a debt collector from making "the false representation or implication that an individual is an attorney or that a communication is from an attorney." 15 U.S.C. §1692e(3). This language was not amended nor qualified upon the repeal of the attorney at law exemption in 1986[1], leading to the dilemma that a debt collection lawyer, who is now subject to the FDCPA, is also subject to a provision that outlaws a debt collector from falsely holding himself or herself out as an attorney. As a consequence, this Court, amongst others, has been forced to examine the language found at §1692e(3) in connection with correspondence generated on an attorney letterhead that in reality comes from a collection agency or a creditor.

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1 Pub. L. No. 99-361 (1986)

In Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993), this Court correctly explained how a lawyer could be liable under 15 U.S.C. §1692e(3). In Clomon, an attorney employed as a part-time general counsel for a collection agency falsely represented his status as an attorney. The attorney did not have an attorney/client relationship with the creditor but allowed his letterhead to be used by a collection agency to send collection letters. This Court explained its holding that the attorney violated 15 U.S.C. §1692e(3) based on the fact that the letters were not "from the attorney in any meaningful sense" because the attorney lacked any real involvement in the collection process and because the letter, in fact, was generated by the collection agency. Clomon at 1320. Clomon is the classic illustration of how the FDCPA provision outlawing the false representation that a communication comes from an attorney would nonetheless apply to a letter written on an attorney's letterhead.

The panel's decision in the instant matter goes far beyond the limited holding in Clomon. The import of the decision requires a debt collection lawyer to scrutinize more information before sending a pre-suit demand that what the attorney needed to win the case in court. An attorney who files suit against a consumer debtor on an open account, such as Miller's account with Lord & Taylor is not required to produce an entire payment history, or even an itemized account in order to obtain judgment under prevailing account stated case law See, Polygram, S.A. vs. 32-03 Enterprises, Inc., 697 F. Supp. 132 (E.D.N.Y. 1988) (discussing elements of account stated cause of action); Fink, Weinberger, Fredman, Berman & Lowell, P.C. v. Petrides, 437 N.Y.S. 2d 1 (N.Y.A.D. 1981) (cause of action for account stated

is established even though Plaintiff's bill is not itemized) and; Citibank, N.A. v. Jones, 708 N.Y.S. 2d 517 (N.Y.A.D. 3 Dept. 2000) (affirming judgment on account stated theory of liability for credit card debt). Therefore, the panel's suggestion (Slip. Op. at 19) that a practice of reviewing an entire payment history would suffice to establish meaningful review before an attorney sends a collection letter imposes a more stringent standard then is required to obtain a judgment on the very same debt. As a consequence, the attorney who makes a pre-suit demand and affords the consumer a chance to articulate a pre-suit dispute fares worse than the attorney who goes straight to court, a result that diminishes the protections available to consumers and operates as a strong disincentive to those attorneys who would otherwise attempt to resolve disputes without a pending lawsuit hanging over the consumers head.

The panel in this case overstepped its role in interpreting this consumer protection statute that is merely designed to eliminate abusive, deceptive and misleading debt collection practices. The decision formulated minimum standards governing the nature and extent of information that a client must provide a debt collection attorney. The panel held that a debt collection attorney may not pursue a matter for a client after "merely being told by a client that a debt is overdue" (Slip Op. at 19), even though there is nothing inherently false or misleading about a lawyer who accepts a case based upon a client's statement that money is due. The seemingly simple statement that a lawyer can not pursue a matter after being told by a client that a debt is overdue produces substantial implications representing a revolutionary transformation of the role of private attorneys in our

legal system. Under the panel's decision, a lawyer's role as a tireless advocate for a client who has retained a lawyer's services is tempered, if not supplanted, by a court mandated oversight process that subjects the attorney's judgment to independent scrutiny in the context of FDCPA litigation.

Moreover, the Panel's statement in this regard runs afoul of the holding in Jenkins v. Heintz, 124 F.3d 824, cert. denied, 523 U.S. 1022, 118 S. Ct. 1304, 140 L.Ed.3d 469 (1998) ("Heintz II") that

> [The Act] does not say that the collector's status as an attorney should add a requirement of independent legal analysis for each aspect of the creditor's claim... To require an attorney debt collector to conduct an independent investigation into the legal intricacies of the client's contract with the consumer would create a double standard for the bona fide error doctrine based upon the identity of the collector. The language of the FDCPA does not provide for such a standard, and pursuant to the reasoning of our last opinion, 25 F.3d at 539-40, we will not impress such an understanding upon it. To interpret the FDCPA as not to treat lawyers and debt collectors equally would contort the statute's meaning, and ignore Congress' drafting and the Supreme Court's interpretation.

(Emphasis added).

In direct contravention of Heintz II, the panel attempts to impose greater duties of inquiry upon a law firm who sends a demand letter than upon a collection agency. As the Heintz II court noted, such a position is inconsistent with the statutory scheme created by Congress.

The panel also explained that "we cannot conclude that the information in Plaintiff's file (reviewed by the attorneys) was adequate to make these kind of (legal) judgments." Slip Op. at 20. Although the panel asserted that they declined to set a minimum standard of information to be reviewed by a debt collection attorney, the opinion, in fact, fashions minimal standards. Particularly significant is the panel's suggestion that the UC&S attorney's affidavit that he reviewed Mr. Miller's file and determined "that a summons and complaint should be filed" (Slip Op. at 21) was insufficient because it did not demonstrate any basis for that determination that the case should be sued. The impact of this language is profound in both its simplicity and in the breadth of its consequences.

In essence, the panel is declaring that any debt collection attorney who sues a debtor is subject to an FDCPA suit by any debtor and, in connection with that litigation, the attorney may be required to demonstrate how he made the decision to file suit on behalf of a client. The attorney must show what information was used to justify the decision to make a claim against the debtor and to later file suit in order to defend against an allegation that the attorney is making a "false representation...that a communication (i.e., the lawsuit) is from an attorney." 15 U.S.C. §1692e(3). A

lawyer who happens to regularly handle consumer claims for a client can no longer act solely in accordance with what the lawyer perceives to be the client's best interests, but must instead take into account the possibility that the lawyer will be required to provide a detailed explanation of why a claim was pursued or why suit was filed on behalf the client. This form of persistent second guessing inserts a wedge into an attorney's duty to act as a zealous advocate for a client. It clearly has a chilling effect on the creditors' bar of every state in the nation.

Traditionally, the law requires privity in order to sue an attorney. See, e.g. Andrewski v. Devine, 720 N.Y.S. 2d 423 (N.Y.A.D. 4 Dept. 2001) and Noble v. Bruce, 349 Md. 730 (1998) As a matter of public policy we do not allow a party of adverse interest to determine how an attorney will best serve his or her client. In opening the door to allow debtors to challenge the manner in which creditors' attorneys determine they should best represent their clients, the Panel's decision does violence to that public policy.

In summary, the panel's decision transforms the Clomon language about meaningful involvement into a mandate as to how real debt collection lawyers are to handle client claims, including a court imposed regulation directing what a debt collection attorney must do before handling a case for a client. This holding leads to the situation where a debt collection attorney who files suit for a client in state court may nevertheless be liable under the FDCPA for not being "meaningfully involved" in the collection of the debt, thereby begging the question of what more can an attorney do to be meaningfully involved in collecting a

debt than to file suit on the claim. This peculiar result illustrates why en banc review is needed to correct this undesirable result.

D. THE PANEL MISAPPLIED CASELAW REGARDING DISCOVERY.

The panel's decision squarely conflicts with prior decisions of this circuit regarding a party's opportunity for discovery. In the instant case, the District Court denied discovery to the Plaintiff after careful consideration of the fact that his claim was not brought upon any personal knowledge and where he had no information whatsoever to refute the affidavits provided by Defendant lawyers that they were real lawyers, who sent real letters, and handled real litigation for a real client. The panel's decision failed to recognize the discretion afforded to the District Court and effectively granted unfettered discovery to any Plaintiff filing any action regardless whether the underlying claim has any facts whatsoever to support it.

In this matter, the panel failed to recognize, as the District Court did, that Plaintiff's cause was pled exclusively upon "information and belief". Miller had and presented absolutely no information that the law firms were not real, or the attorneys who sent the letters to him were not real. After filing his suit, Miller then sought discovery to determine if his complaint had any merit.

This court has previously held that discovery is not to be used as a "fishing expedition." Paddington Partners v. Bouchard, 34 F.3d 1306 (2nd Cir 1994). As

stated by the court, "In opposing Jeffries' First Summary Judgment Motion, Econocom did not submit a Rule 56(f) affidavit, but made reference to a need for additional discovery in its memorandum in opposition to the motion. A reference to Rule 56(f) and to the need for additional discovery in a memorandum of law in opposition to a motion for summary judgment is not an adequate substitute for a Rule 56(f) affidavit, *Burlington*, 769 F.2d at 926 (collecting cases), and the failure to file an affidavit under Rule 56(f) is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate..." Id. at 1137. The court continued, "Econocom's argument is that it should be allowed to find out if it has a claim, rather than that it has a claim for which it needs additional discovery. Such divagation is decidedly not the object of the discovery procedures outlined in the Federal Rules of Civil Procedure." Id. at 1138. "A court can reject a request for discovery, even if properly and timely made through a Rule 56(f) affidavit, if it deems the request to be based on speculation as to what potentially could be discovered." Id.

Given that Miller brought his claim with no facts to support his contention that the law firm letters "falsely represented" that attorneys were handling Lord & Taylor's case, the District Court's denial of discovery was proper and consistent with this court's prior holdings.